TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. OF L., ET AL., PETITIONERS,

vs.

COUNTY OF DOOR, A MUNICIPAL CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1958
CERTIORARI GRANTED NOVEMBER 10, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

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IN THE CIRCUIT COURT OF DOOR COUNTY STATE OF WISCONSIN

County of Door, a Municipal Corporation, and Arnold G. Zahn and Theodore Oudenhoven, Plaintiffs,

v.

Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local No. 298, AF of L, and Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity, Defendants.

[fol. 1]

Appendix to Appellant's Brief

Memorandum Decision From the Bench—July 25, 1957

The record in this case clearly establishes that there was no controversy between the plaintiff, Door County, the owner of the court house building to be constructed, and any of the sub-contractors or any employees of Door County. The record is equally clear that there was no controversy between the general contractor, as employer, and his employees. The record is clear that there was no controversy between plaintiff Zahn, as employer and plumbing contractor, and either of his two employees.

I am constrained to find that at the time the picket line was established and one picket employed who carried a sign, which action was directed and initiated by Richard Garot, a business representative of the Plumbers, Steamfitters, Petroleum Fitters and Apprentices of Local Union 298, AFL-CIO, the union that Mr. Garot represented was not a representative of any employee and was not the bargaining agent so that they were a party to the contracts or the situation generally that could give rise to a labor dispute.

There being no labor dispute and no situation that could give rise to a labor dispute, the physical presence of the picket from the first time the first picket was placed and oc-
[fol. 2] cupied a position on the sidewalk outside the courthouse, and the second picket, was coercive action in itself

and amounted to economic pressure and was designed to cause a work stoppage, which did occur. Picketing is not confined to advertising the cause of a union, which they have a perfect right to do under the Fourteenth Amendment, I believe it is, or anyway the freedom of speech, guarantee under the Constitution. There being no labor dispute in this case, the picketing was unlawful picketing as prohibited by Sec. 103.535, Wisconsin Statutes.

The claim that this project was an engagement in interstate commerce because the greater part, in money, of the cost of materials and of the entire project was goods or material manufactured outside of the state, is without merit. I say that it is without merit for these reasons. (1) That by no concept or strained construction of the Interstate Commerce Clause can the construction of a building be called engaging in interstate commerce. (2) The plaintiff, Door County, who is aggrieved in this matter because of the work stoppage on the construction of their courthouse which they are required under the law to construct, could not, by its very character, engage in interstate commerce. Regardless of the fact this undertaking and this project does not partake of the character of an interstate commerce undertaking, the state courts have jurisdiction to enforce their own statutes against any unlawful act. The Supreme Court of the United States has stated that Congress, in the enactment of [fol. 3] the Taft-Hartley Law, did pre-empt certain fields of labor. However, in more recent decisions, the U. S. Supreme Court has made clear that the area of enforcement of the law where substantial rights of citizens of the state are affected by unlawful conduct, that state courts can act, that the legislature can speak and that state courts can enforce injunctions.

This picketing being unlawful, which I find to be the fact, did constitute a violation of the law and a violation of the statute and it is a proper subject of equitable relief.

It follows from what has been said that the temporary injunction will be issued, and a bond of $2000 to be furnished by the plaintiff, Door County, and filed with the Clerk of Circuit Court of Door County prior to the presentation to the Court and filing of the temporary injunction.

It is ordered that counsel for the plaintiffs prepare and submit to the Court and to opposing counsel formal written findings of fact and conclusions of law consistent with the memorandum decision rendered from the bench.

Dated: July 25, 1957.

IN CIRCUIT COURT OF DOOR COUNTY

COMPLAINT

Now comes the plaintiffs, County of Door by Donald J. Howe, District Attorney, and Arnold G. Zahn and Theodore [fol. 4] Oudenhoven, by Donald J. Howe, their attorney, and for a cause of action against the defendants allege and show the court as follows:

1. That the plaintiff County of Door is a municipal corporation organized and operating under and pursuant to the laws of the State of Wisconsin, and plaintiff Arnold G. Zahn is a plumbing contractor residing at Sturgeon Bay, Door County, Wisconsin, and plaintiff Theodore Oudenhoven is engaged in the general construction business under the trade name of Oudenhoven Construction Company, and his residence and business address is Kaukauna, Wisconsin.

2. That the defendant Plumbers Local Union No. 298 is a labor organization with its office in Green Bay, Brown County, Wisconsin.

3. That the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity is an organization composed of representatives of organized labor of the various trades, engaged in the construction business in Green Bay, Wisconsin, and vicinity, and that the term "vicinity" includes Door County, Wisconsin.

4. That heretofore, on the 1st day of March, 1957, the plaintiff Door County entered into contract with the plaintiff Arnold G. Zahn to do plumbing work on the addition to the Door County Courthouse.

5. That heretofore, on the 1st day of March, 1957, the plaintiff County of Door entered into a contract with the

[fol. 5] plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, to do the general contracting work upon an addition to the Door County Courthouse.

6. That heretofore, on the 17th day of July, 1957, the defendant union perpetrated unfair labor practices in that it promoted and induced picketing in a manner not constituting an exercise of constitutional guaranteed freedom of speech, and have hindered and prevented by picketing and other means the lawful work and employment of the plaintiffs, and have obstructed and interfered with the entrance to and egress from the plaintiffs' place of employment, to-wit: The addition to the Door County Courthouse, located in the City of Sturgeon Bay, Wisconsin, and has prevented the plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, from the performance of this contract with the plaintiff County of Door.

7. That the conduct of the defendants is violative of Section 103.535 of the Wisconsin Statutes in such case made and provided.

8. That there is no labor dispute existing between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of Section 103.62(3).

9. That the unlawful acts have been committed and will continue unless restrained; that substantial and irreparable [fol. 6] injury to plaintiffs will follow unless injunctional relief is granted; that greater injury will be caused to plaintiffs than to defendants if relief is granted; that the plaintiffs have no adequate remedy at law; that the public officers charged with the duty to protect plaintiffs' property are unable to furnish adequate protection; that the relief prayed for does not violate Section 103.535.

Wherefore, Plaintiffs pray that an injunction be issued against the defendants, their agents and officers, restraining them from continuing the acts set forth in this complaint.

Donald J. Howe, Attorney for Plaintiffs.

IN CIRCUIT COURT OF DOOR COUNTY

CLERK'S NOTE: RE ANSWERS

A separate answer was filed on behalf of the defendant, Building and Construction Trades Council of Green Bay, Wisconsin, and Local No. 298, Plumbers and Steamfitters Union, of Green Bay, Wisconsin. Both answers were identical except for the identification of the defendant.

IN CIRCUIT COURT OF DOOR COUNTY

ANSWER

1. Admits the allegations of paragraphs one and three of the plaintiffs' complaint.

2. Denies the allegations of paragraphs two, six, seven and nine of the plaintiffs' complaint.

3. With reference to paragraph two of the plaintiffs' complaint, alleges that the labor organization representing the plumbers and steamfitters in the Green Bay vicinity [fol. 7] is known as Local 298 of the Plumbers and Steamfitters Union affiliated with the AF of L, CIO.

4. With reference to allegations of paragraphs four and five of plaintiffs' complaint, by reason of lack of information and belief, defendant is unable to form an opinion as to those allegations, and therefore, puts plaintiff to his proof.

5. With reference to paragraph eight of plaintiffs' complaint, defendant alleges that the question of labor dispute is not concerned with under the hereinafter alleged defense, therefore, denies the same.

6. Defendant alleges further that the County of Door, a Municipal Corporation, is an improper party plaintiff, and has no cause of action against the defendants. That the plaintiff Theodore Oudenhoven, has an existing labor contract with the various unions affiliated with the building construction trades, and which contract covers the construction of the Door County Courthouse of Door County,

Wisconsin, the terms of which are more specifically set forth in said contract.

Defendants allege further by way of defense that the construction of the Door County Courthouse addition is covered by the labor management relations act of 1957 Federal Statutes, and that under that statute and the cases so provided, the Wisconsin Statute referred to in plaintiffs' complaint, and any other statute of the state of Wisconsin [fol. 8] and cases with reference to labor relations has been pre-empt by the federal statute and cases, and only the federal statute and cases are controlling with reference to the construction of the Door County Courthouse by reason of the fact that this affects commerce under the commerce clause of the United States Constitution; and further, that if an injunction were granted as prayed for in plaintiffs' complaint, it would be a violation of the United States Constitutional guarantee of freedom of speech.

Wherefore, defendants pray that plaintiffs' complaint be dismissed together with costs and disbursements of this action.

Warne, Duffy, Dwane, Miller & Gerlikowski, Attorneys for Defendants.

In Circuit Court of Door County

Now, Therefore, upon all the records, files and proceedings had herein, I, Arold G. Murphy, Circuit Judge Presiding, do hereby make these my

Findings of Fact—July 27, 1957

1. That the plaintiff County of Door is a municipal corporation organized and operating under and pursuant to the laws of the State of Wisconsin, and plaintiff Arnold G. Zahn is a plumbing contractor residing at Sturgeon Bay, Door County, Wisconsin, and plaintiff Theodore Ouden- [fol. 9] hoven is engaged in the general construction business under the trade name of Oudenhoven Construction Company, and his residence and business address is Kaukauna, Wisconsin.

2. That the defendant Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local Union No. 298 AF of L, is a labor organization with its office in Green Bay, Brown County, Wisconsin, and is properly designated as Local 298 of the Plumbers and Steamfitters Union affiliated with the AF of L, C.I.O.

3. That the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity, is an organization composed of representatives of organized labor of the various trades engaged in the construction business in Green Bay, Wisconsin, and vicinity, and that the term "vicinity" includes Door County, Wisconsin.

4. That heretofore, on the 1st day of March, 1957, the plaintiff Door County entered into contract with the plaintiff Arnold G. Zahn to do plumbing work on the Addition to the Door County Courthouse.

5. That heretofore, on the 1st day of March, 1957, the plaintiff County of Door entered into a contract with the plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, to do the general contracting work upon an Addition to the Door County Courthouse.

[fol. 10] 6. That in addition to the aforesaid contract, the County of Door entered into approximately eight other contracts for the various items of construction on the Addition to the Door County Courthouse.

7. That between the 26th day of June, 1957, and the 5th day of July, 1957, and between the 15th day of July, 1957, and on the 25th day of July, 1957, a picket was placed on the sidewalk near the Door County Courthouse Addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation "Plumbers Local 298, AF of L, CIO."

8. That said picket was placed there by Richard Garot, the business agent for said Local 298 of the Plumbers and Steamfitters Union, affiliated with the AF of L, CIO, and by Walter Ducat, Treasurer of the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity. That said Richard Garot knew that the effect of placing

the aforesaid picket at such place would be that the union employees would not cross the picket lines and the construction work on the Door County Court house Addition would be halted. That the picketing was intended and did have the effect of halting the construction on said Door County Courthouse Addition.

9. That the purpose of halting construction on the Door County Courthouse Addition was to attempt to coerce the [fol. 11] plaintiff Arnold G. Zahn to force his employees to organize into a union shop, or in the alternative, to force the plaintiff Arnold G. Zahn to release his contract with the plaintiff County of Door.

10. That the conduct of the defendants is violative of Sec. 103.535 and Sec. 11.04 and 11.06(2)(b) of the Wisconsin Statutes in such case made and provided.

11. That there is no labor dispute existing between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employes of the plaintiffs and the defendants, within the meaning of Section 103.62(3).

12. That the unlawful acts have been committed and will continue unless restrained; that substantial and irreparable injury to plaintiff County of Door will follow unless injunctional relief is granted; that greater injury will be caused to plaintiffs than to defendants unless relief is granted; that plaintiffs have no adequate remedy at law; that the public officers charged with the duty to protect plaintiffs' property are unable to furnish adequate protection; that the relief prayed for does not violate Section 103.535.

And I find as

CONCLUSIONS OF LAW

1. That no labor dispute exists between the defendants and any employees of the plaintiffs.

[fol. 12] 2. That the picketing is illegal and violative of Sec. 103.535, Sec. 111.04, and Sec. 111.06(2)(b) of the Wisconsin Statutes.

3. That the defendant be restrained and enjoined until final hearing of this matter, or until further order of the court, from picketing the job site at the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Let an Order be Entered Accordingly.

Dated this 27th day of July, 1957.

By the Court, /s/ Arold F. Murphy, Judge Presiding.

IN CIRCUIT COURT OF DOOR COUNTY

RESTRAINING ORDER—dated July 27, 1957

It Is Ordered:

That until the final disposition of this matter upon trial and until the further order of the Court, the defendant Local 298 of the Plumbers and Steamfitters Union, affiliated with the AF of L, CIO, its agents and officers, and the defendant Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity, its agents and officers, be and it is hereby restrained and enjoined from picketing or perpetrating any act amounting to picketing on the job site known as Door County Courthouse Addition, in the City of Sturgeon Bay, Wisconsin.

[fol. 13] Dated at Green Bay, Wisconsin, this 27th day of July, 1957.

By the Court, /s/ Arold F. Murphy, Judge Presiding.

IN CIRCUIT COURT OF DOOR COUNTY

STIPULATION RE RECORD ON FINAL JUDGMENT—
October 21, 1957

It Is Hereby Stipulated and Agreed by and between the plaintiffs and defendants in the above entitled action, through their respective attorneys, that in asmuch as the record herein contains all of the facts and evidence that

would be adduced upon a trial on the merits of the issues herein, the court may consider such record as the record upon which the court may enter such order and final judgment as the court may deem proper.

Dated this 21st day of October, 1957.

/s/ Donald J. Howe, Attorney for the Plaintiffs.

Warne, Duffy, Dewane, Miller & Gerlikowski, By /s/ Lloyd O. Warne, Attorneys for the Defendants.

Upon the foregoing stipulation, the Court on the 23rd day of October, 1957, entered Findings of Facts and Con-
[fol. 14] clusions of Law identical to those for the temporary injunction.

IN CIRCUIT COURT OF DOOR COUNTY

JUDGMENT AND ORDER FOR PERMANENT INJUNCTION—October 23, 1957

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organization, be perpetually enjoined and restrained from picketing, or perpetrating any action amounting to picketing, on the job site known as the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Dated this 23rd day of October, 1957, at Green Bay, Wisconsin.

By the Court: /s/ Arold F. Murphy, Judge presiding.

IN CIRCUIT COURT OF DOOR COUNTY

Abridgment of Testimony

NOTE: RE AMENDMENT TO COMPLAINT

Mr. Donald J. Howe, District Attorney for Door County, at the opening of the hearing moved to amend the complaint with respect to paragraph 6 to read: "That heretofore on the 17th day of July, 1957, and prior thereto, the defendant union perpetrated unfair labor practices in that it promoted and induced picketing in a manner not constituting [fol. 15] an exercise of constitutional guaranteed freedom of speech, and have hindered and prevented by picketing and other means the lawful work and employment of the plaintiff, and have obstructed and interfered with the entrance to and egress from the plaintiffs' place of employment, to-wit: The addition to the Door County Courthouse, located in the city of Sturgeon Bay, Wisconsin, and has prevented the plaintiff, Theodore Oudenhoven, doing business as Oudenhoven Construction Company, from the performance of this contract with the plaintiff County of Door."

The Court allowed the amendment.

Direct Examination of George Schmelzer

My name is George Schmelzer. I am chairman of the Door County Property and Building Committee and a member of the Door County Board. As Chairman of the Building and Property Committee, my duty was with the letting of the bids and seeing that the work was lined up and to take care of whatever trouble arises with regard to the construction of the new addition to the Door County Courthouse. The construction of the building was let to low bidders on this job. All of the contractors were union contractors, except Mr. Zahn; the plumbing contractor.

At the time that we were letting the contracts, I did [fol. 16] have contact with a union representative named Richard Garot. I was at work in the garage at Baylor Motor Company. Mr. Garot was the Business Representative of the Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices, Local Union 298, A.F. of L., C.I.O.

The conversation that I had with Mr. Garot was that he told me that he understood that we were letting, had let a non-union contractor, and that we could expect trouble because the union men would not work with a non-union contractor on the job. I didn't tell Mr. Garot anything. The only other conversation I had with union men was when one came to see me and told me about the same thing, that as soon as a non-union plumber would get on the job, that the union men would walk off the job. They wouldn't stay on the job. I don't know exactly who the man was, except that he is one of the Reeke crew, his first name being Bob, of Reeke, Heating and Ventilating. I am not sure if that was before or after the contract had been signed with Zahn.

I was aware of the fact that a picket was placed on the courthouse job. I think it was around June 17th. That picketing has interfered with our work in attempting to complete the construction of the courthouse. The picketing has caused me personal difficulty as an officer of the county because we tried every means that we thought we could to get something lined up or straightened up and proceed with the construction of the building. This has caused expense or inconvenience to Door County.

It has caused a delay of work and special county board [fol. 17] meeting and special committee meeting. The block that the courthouse addition will occupy is all dug up and dirt placed around it and the building is started—the roof, floor and the first floor. It has caused some effect on the tenants of the present courthouse. The front door is closed. One of the offices has moved out. That is the ASC. We rented them a room by the month and they are paying $20 a month to Door County.

At this time work has stopped completely.

Cross Examination by Mr. Warne

I am Chairman of the Property and Building Committee, and as such I was one of the members that reviewed the various bids that were received for the building of the addition to the Courthouse. ASCO of Appleton submitted a bid which was the lowest bid offered for the plumbing

contract in the courthouse. Their bid was $14,348, and the bid of Arnold Zahn was $16,655. Mr. Zahn was the next lowest bidder for the plumbing contract.

I and the Building Committee released ASCO from the plumbing contract.

I am familiar with the specifications and the notice of bidding for this particular project. The project in question is an addition to the present courthouse.

It was the intention to occupy the present courthouse in its present state during the entire period of construction, and because of the construction it was necessary to close the front door.

[fol. 18] The ASC is an office for the Security Credit Association, which is a branch of a federal lending agency for farmers. They occupied a small room on the bottom floor and they moved out for the simple reason that the courthouse was under construction and their moving had nothing to do with the picketing so that insofar as the tenants of the courthouse are concerned they are occupying offices and they are doing business just the same as before we commenced construction. So, insofar as the County is concerned, there has been no damage to the county in the occupancy of the present courthouse.

I made the statement that one of Reeke's men saw me, and said that the union men would not work with the non-union men. He didn't tell me who he was other than he was employed by Reeke. He was only a workman for Reeke, not an officer of the union, nor did he represent to be such officer. All that Dick Garot, Business Representative of the Plumbers Union, told me is that he understood that we were going to let this contract to a non-union plumber, and that we could expect trouble because the union men would not work with non-union men. That is all he told me.

There was only one picket on the job, and he was walking on 4th street, which is the west entrance to the Courthouse. There is also an entrance on the east side of the Courthouse. The Courthouse is a full square block, and there are public streets on each side of the Courthouse. [fol. 19] Both the east and front doors were used, and the front door was used more than the rear. The Courthouse is about two to three blocks from the downtown district, and all around the Courthouse it is well built up with both

residential and business places. All four streets surrounding the Courthouse are used by a large number of automobiles and pedestrians; it is a well traveled street.

The population of Sturgeon Bay is around 7,200, I think. I was around the building almost every day. As Chairman of the Property and Building Committee, I was there almost every day, or every other day, but didn't oversee the work on the new addition. I left that mostly to the inspector, the architect.

I don't recall the exact wording which appeared on the picket sign that was carried by this one gentleman.

I have the figures on all of the construction in connection with the addition, but I couldn't tell you right offhand; but the County Clerk is here and he has the actual contracts with him. I don't know the date of the contract that Mr. Zahn signed. I know when the contracts were opened. No federal funds were used that I know of. I never did call either the sheriff's department or the police department in connection with the picketing.

I never saw any necessity for the use of local police officers to maintain order.

Redirect Examination

[fol. 20] I attended the meeting of the County Board last night on the 24th of July. At that meeting a resolution was passed ratifying the wage scale set forth in the specifications. Prior to the time that the contracts were let, the Property Committee approved the specifications. The wage scales were in those specifications, and we approved them.

Recross Examination

The Building Committee approved the wage scale as set forth in the specifications and also the County Board. I think it was on April 16, and last evening the County Board approved the minimum wage scale as listed in the specifications. The Property Committee accepted them in April, and not the entire County Board. The Property Committee had been authorized prior thereto by a resolution or motion passed at the County Board to take charge of this construction.

When Richard Garot, the Business Representative of the Plumbers Union talked to me, the contract had not been signed, I think. But the plaintiff, Zahn had been designated as the accepted bidder. About all Mr. Garot said was that we could expect labor trouble if we accepted his bid. He did not say how we could avoid labor trouble. He did not ask us to award the contract to a union plumber. About all he told me was that if we had Zahn, being a non-union contractor, that the union men wouldn't work alongside of him. He did not mention what men wouldn't work, [fol. 21] he just mentioned union men. He just said if Zahn, who is a non-union plumber contractor, was awarded the contract that we could expect labor trouble because other union men would not work with him. This conversation took about fifteen minutes.

* * * * * * *

Direct Examination of Lawrence Johnson

By Mr. Howe:

I am Chairman of the Door County Board.

I am familiar with this problem. I didn't see the first picket. I saw the picket for the first time yesterday. I heard the testimony that the picket picketed on the south side of the Court House towards the front door. I would say that street was both residential and business. There are no business establishments on that street; nothing except schools. As far as I know the county or the high school agricultural department building is there and there are a couple of residences and one tenant building, and one apartment building. There is a dead end street to the north as you go out the front entrance from the courthouse. * * *

Since the courthouse construction began there is no traffic through the front door of the courthouse. I would not say there is much traffic along that street in front of the courthouse when I have been there. I would character- [fol. 22] ize it as medium perhaps. I am not a resident of Sturgeon Bay. I didn't get there every day and I would say there is very little traffic. It does not compare with the traffic on Main Street.

No Cross Examination

Direct Examination of Theodore Oudenhoven

By Mr. Howe:

I am known as Dick Oudenhoven, and I operate the Dick Oudenhoven Construction Company. I entered into a contract with Door County on about April 1st to do general contracting on a courthouse addition. Since entering this contract I have not had any labor dispute with my employees. Offhand I don't know how much time I have been unable to work on the job because of pickets there. I have no dates on when the picket was placed on the job. The last picket went on I guess about a week ago Monday. We have not worked on the job since a week ago Monday when the picket went on. The picket was on before that, then taken off again. I don't know how much we worked—three days, a couple days, or something. I think the picket must have went on about Wednesday of last week. That's about it. It would be about the 17th day of July as near as my memory is. There was a picket on prior to that, then that picket was taken off. We worked when the picket was off. None of my employees are working now. The last day that we worked must have been the 17th, the day that the [fol. 23] picket came back. The reason that the men are not working is they wouldn't cross through the picket line. All our men are union and the minute the picket comes on they walk off. The superintendent told me that the picket was on and we would have to leave the job. No employee told me that personally. He is not in the court room. Offhand, I wouldn't know what losses there may be. Starting, losing time between, it always costs us money. How much it is going to cost, I don't know. It will not be a substantial amount. My contract called for carpenter, concrete, masonry and the entire structure of the building except plumbing, heating. The painting is in our contract. No plumbing, no heating, no electric. I think that's it. These last are sub-contracted directly with the county.

I am named on the contract of the Falls River Valley Contractors Association and Building Trades Employers Association of Green Bay. (See Exhibit A) I am a member of that association. I am acquainted with Article 9 which provides, "The refusal of an employee to enter and do work or make deliveries in a place where a strike or lockout is in force shall not be deemed a violation of this agreement nor shall it be justification for discharge." I am listed as a member of that Association with a contract with the International Hod Carriers and Common Laborers Union. (Exhibit B) The contract was signed by the asso- [fol. 24] ciation in my behalf and I am working under that agreement. On page 20, Article 8, provides: "Picket Line: The contractors shall not request nor instruct any employee to go through a picket line. The refusal of an employee to enter and do work or make deliveries in a place where a strike or lockout is in force shall not be deemed a violation of this agreement nor shall it be justification for discharge."

I never requested any of my men to cross the picket line. I do not have any figures relative to the contract I signed with the county. I was not subpoenaed by the defendants. I was asked to come up for the County Board, and when I called home this noon they told me at the office there was a subpoena there. I don't know who it is.

The total contract for the general contract on this building was $267,711. In the past year we have been running possibly two-thirds labor, or one-third labor and two-thirds material. That would vary according to the type of contract. This was a fire-proof steel concrete construction. In the construction of that building we were to use concrete beams with just steel reinforcing rods. We purchased the reinforcing rods at Cook and Brown, Oshkosh. I don't know if they purchased them from outside of the state of Wisconsin. I suppose they are not milled in Wisconsin. Offhand, I don't know the amount of steel used in the building.

[fol. 25] *Direct Examination of* Arnold G. Zahn

By Mr. Howe:

My name is Arnold G. Zahn. I entered into a contract with Door County to do plumbing work on the courthouse addition. I have a plumbing shop in Sturgeon Bay with three employees, Herman Peterson, Bob Peterson, and Del Sherm. I worked on the job myself as a plumber. I have operated the shop five years. I have never had an organized shop or union shop. My employees never asked for a union election. I do not have a labor dispute with my employees at this time. Once I was contacted by the union after entering into this contract. Mr. Richard Garot of the Plumbers A.F. of L., 298, contacted me. He contacted me at my shop. He asked me about joining. I said I couldn't and that it would put me out of business. I had no conversation with reference to my employees. The conversation about joining the union all circulated around this courthouse job; that I should join, otherwise there may be a little dispute over there. The conversation took place in my shop. Mr. Garot left his card. (Exhibit 1) He left his card in case I wanted to contact him for some questions. I don't remember if he stated that or not. I attempted to contact him twice. I asked him to come and call on me. He said he would. To permit the courthouse to be completed, I tried to get rid of the contract. I thought that would be the only way it would be built, if I was out of it. [fol. 26] The Union Representative did not tell me any way to prevent the picketing and stopping of the job; only that I join the union.

Cross Examination by Mr. Wurne:

I had only one conversation with Mr. Garot at my shop. All he ever said to me, he asked me to join the union or there may be a little dispute over there, meaning the courthouse.

I work at the tools of my trade as a plumber. As a licensed master plumber I work along side of my men. I only have myself and one apprentice. . . . .

I did not withdraw from this contract, not totally. Sometime around the 8th or 9th or 5th of July, in that neighborhood, the first picket was withdrawn from the job, and everybody went back to work with the exception of me and my apprentice. The next picket went on July 17th. We did not work on that project between July 5th and July 17th. A week ago last Saturday in the afternoon I went over there and worked for about three hours. The other workmen on the project were not there because they don't work on Saturdays. On the 13th, that is the Saturday I worked. I was not the low bidder on the project.

[fol. 27] *Direct Examination of* Richard Garot

By Mr. Howe:

My name is Richard Garot. I am business representative of the Plumbers Local 298, A.F. of L., CIO. I am aware of the picket that was on the Door County job during the month of July. I don't have the exact date he went on first, I think it was on the 17th. He went on a week ago Wednesday; that was the second time. There was another picket there before in June. He ended his picketing about July 5th. He was on seven or eight days from approximately the 27th or 28th of June, until July 5th. The picket was replaced on the 17th of July, to date.

I have authority to put a picket on any job where there is a non-union plumber working on the job from our union, Plumbers Local Union 298, by action of a motion at a regular meeting. This picket was placed as a result of my initiative. I put the picket there because we had non-union plumber contractor and plumbers on the job. I expected the men to come off like they did. I expected the men to stop working as soon as I put the picket on, the union men.

A union man who crosses the picket line would probably be disciplined in some way, but I don't know how, by his own union. I don't know what would happen to a plumber if he crossed a picket line; we never had one do it, so I couldn't tell you. It has been my experience when you put a picket on, the job stops.

[fol. 28] *Direct Examination of* Walter Ducat

By Mr. Howe:

I am Treasurer of the Building Trades, Green Bay.

I do not know Fred Renard.

No action was taken on the part of the Building Trades Council with regard to the picketing of the courthouse job.

Direct Examination of Fred Renard

By Mr. Howe:

My name is Fred Renard. I live in the Town of Union. I was a picket on the courthouse job starting June 27th. I worked 42 hours. I received a card from the gentlemen who instructed me to picket. (Exhibit 4—This card reads: "Jack O'Malley, Building and Construction Trades Council, Green Bay and Vicinity") I recognized the person who instructed me to picket. It was Walter Ducat. * * * He gave me the card so I could call up.

I am a member of Local 539 of the Laborers Union. On the sign I carried when I was picketing it was written that there was a guy that didn't belong to Local 298 Plumbers; the workers didn't belong to Plumbers 298, A.F. of L., C.I.O.

[fol. 29] *Cross Examination by Mr. Warne:*

I was the only picket on the job. I walked on the west side of the courthouse and on the south side half way the block and all the way on the west side. I did not stop any men or anything, any trucks from going in and out of the premises. Nobody from management or police or sheriff's department asked me to move away from the picketing.

I do not live in Sturgeon Bay. I do live in Door County. I am pretty much acquainted with the downtown district of Sturgeon Bay. The first day I did see a lot of traffic, but after that I didn't any more. I wouldn't call it a well-traveled street that goes by the courthouse; I think the one on the east side would be more traveled. More than the other side. The courthouse is two blocks from the stop

and go light and that is where the business district starts. There is a school directly across the street from the courthouse on the north side. There are homes built up around that area around the courthouse, some on the south side and some on the west side, and also on the east side. I saw some people walking along the sidewalk by the courthouse.

Redirect Examination by Mr. Howe:

I walked on the sidewalk when I was picketing. I didn't commit any unlawful act during the time I was picketing to my knowledge, I don't think so.

[fol. 30] *Direct Examination of* George Reeke

By Mr. Warne:

I live in Green Bay, and I am president of the George F. Reeke Company. We are plumbing, heating and air conditioning contractors. I have the contract for the heating in the Door County Court House Addition. * * * The contract provides $36,964 for all of the heating and ventilating. We furnish the architect with a breakdown of our contract price which is used for the purpose of drawing estimates on the contract. I will use those figures with your permission. Labor is $8063.77. Materials, ten items. Item one,—pipes, fittings, valves, hangers etc., $3369.95. Not all of those items are manufactured outside of the state of Wisconsin. There is no pipe milling in Wisconsin, there are very few sheeting companies; I don't believe very many valves are made here. I would say probably 90 per cent comes from outside of Wisconsin. I can qualify that. We buy these supplies from wholesalers frequently in the State of Wisconsin, who, in turn buy them from their sources of supply. Many times we do not know their sources of supply. Boilers, $2205.91. The boilers are manufactured in Trenton, New Jersey. They are purchased through a wholesale house in Green Bay, Wisconsin. Condensate return pump, $478.18. It is manufactured by the Chicago Pump Company. I am quite sure their plant is in Chicago or [fol. 31] suburb. Radiators, $2186.18, manufactured in

Iowa. Unit Ventilators, $1809.59, manufactured in Detroit Michigan. The next item is a Bond from the Federal Insurance Company of Seaton, New Jersey. The balance of the items are sub-contractors. Sheet Metal Work, $6787.33. The sub-contract is awarded to a Green Bay firm. They will buy their plates through regular sources, they will fabricate it in Green Bay and deliver to the job site. They are put together like a box. The material itself is not made in Wisconsin. In sheet metal work the material would be probably one-third of the total contract cost. Temperature Control, $9377.46, from the Johnson Service Company in Milwaukee, and that includes the labor of installing that at the job site. I think the labor would amount to about 20 per cent. To the best of my knowledge they have a manufacturing plant in Milwaukee. The next item is insulation, $1861.04. I don't know who the subcontractor will buy that from, but it is not in the State of Wisconsin. The next item is painting, $328.41. Offhand, I would say is (sic) represents 80 per cent labor. I don't know if the paint is made outside of Wisconsin. Electrical work is $218.95. That's the wires to connect the switches to the fans and motors, etc. I do not know what represents materials and labor. The next item is labor, $8063.77. • • •

Patrick Martin was called as a witness, and after he was identified the record indicates discussion by counsel [fol. 32] and finally the following stipulation:

STIPULATION OF FACTS

Mr. Warne: At this point then we will clarify it. I was going to call the County Clerk and I conferred with him during the recess for the purpose of showing the project cost, and he tells me it is approximately $450,000, exclusive of furniture with which we have no concern. So under that 35 per cent represents labor on the construction job, 65 per cent represents material. Of that 65 per cent, 15 per cent is manufactured in Wisconsin, and 50 per cent is manufactured outside of the State of Wisconsin.

The Court: Is that conceded and stipulated?

Mr. Howe: Yes.

The Court: All right, let the record so show.

Direct Examination of Richard Garot

By Mr. Warne:

My name is Richard Garot. I live in Green Bay and I am the business representative for the Plumbers, Steamfitters Local 298. Local 298 has jurisdiction of Door County.

I contacted Mr. Zahn about April 25th at Zahn's Plumbing, Sturgeon Bay. At that time I asked him if he could sign a union contract with our union on account of him being low bidder on the courthouse. He told me he had three men employed by him. That represented one apprentice and two regular men. One of them was a member [fol. 33] of the union and one was not. At that time I asked him to sign a contract, if he could sign a contract with our union or else there may be a little dispute on the courthouse job. We had a little conversation about different things, but I guess that was all pertaining to this case. There was conversation at that time about the fact that one of his men belonged to the union. He told me that. He was not working on the courthouse job. He called me after that at my home in Green Bay. He asked me if he could sublet his contract to a union contractor. I told him I didn't see any reason why he couldn't. He asked me if it would be legal, and I told him I would have to see my attorney on that. Then he called me back again on Saturday afternoon, and I told him it would be perfectly alright with us if he wanted to sub-let his contract. He said, "Maybe I don't want to sub-let my contract." I said that was up to him and that was the day he was working on the job, the 13th of July.

The picket was placed on the job at my request. I asked Mr. Ducat to get the picket, and he placed it there at my request. The purpose of that picket was to leave the union men know that the job was not 100 per cent union, and to leave the public know that the job was not 100 per cent union.

Cross-Examination by Mr. Howe:

It was not to stop work on the job as long as the non-union plumber contractor was there. I thought that would

[fol. 34] be the effect of the picket, but I didn't know that is something nobody knows, I guess.

Local 298 of the Plumbers Union got jurisdiction in Door County back in 1955, I guess. The employee that Zahn had, I was told, was a member of the Metal Trades. Our union does not have jurisdiction over the Metal Trades. The Trades Council does not have jurisdiction over the Metal Trades in Green Bay. We do have jurisdiction if they work on a building trades job.

I had no conversation with any of Zahn's employees while I was in his shop.

I did not ask Mr. Zahn to join the union. I testified before that it has been my experience when a picket went on a job that the union men would stop work. I expect that placing a picket on the job at the courthouse would result in stoppage of work by men of other trades and crafts, if they are union men. That is what did happen.

Some but not all of the arguments of counsel and Mr. Victor Harding, who asked to be heard amicus curiae, was included in the record.

[fol. 38]

IN SUPREME COURT OF THE STATE OF WISCONSIN
Door Circuit Court

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G. ZAHN and THEODORE OUDENHOVEN, Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, AF OF L, and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY, Appellants.

ARGUMENT AND SUBMISSION—April 9, 1958

And now at this day came the parties herein, by their attorneys and this cause having been argued by William J. Duffy, Esq., and Donald D. Miller, Esq., for the said

appellants, and by Donald J. Howe, Esq., for the said respondents, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 39]

IN SUPREME COURT OF THE STATE OF WISCONSIN

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G. ZAHN and THEODORE OUDENHOVEN, Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL No. 298, AF of L, and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY, Appellants.

JUDGMENT—May 6, 1958

This cause came on to be heard on appeal from the judgment of the Circuit Court of Door County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Door County, in this cause, be, and the same is hereby, affirmed with costs against the said appellants taxed at the sum of

Justice Currie concurs.

Justice Fairchild dissents.

[fol. 40] [File endorsement omitted]

STATE OF WISCONSIN: IN SUPREME COURT

No. 273, August Term, 1957

COUNTY OF DOOR, a Municipal Corporation, et al., Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL No. 298, A F OF L, et al., Appellants.

Appeal from a judgment of the circuit court for Door county: Arold F. Murphy, Circuit Judge, presiding. Affirmed.

OPINION—May 6, 1958

Action commenced by plaintiffs County of Door, a municipal corporation, Arnold Zahn and Theodore Oudenhoven against defendants Local 298 of the Plumbers and Steamfitters Union of Green Bay and Building and Construction Trades Council of Green Bay, Wisconsin and Vicinity, for an injunction restraining the defendants, their agents and officers, from picketing the job site at the Door County court house addition in the city of Sturgeon Bay, Wisconsin. From a judgment granting the injunction prayed for, defendants appeal.

Early in 1957 Door County asked for bids on the construction of an addition to the court house at Sturgeon Bay. They were reviewed by the Door County Property and Building Committee and contracts were let to the low-[fol. 41] est responsible bidders. On March 1, 1957 the County entered into a general contract with Theodore Oudenhoven for $267,711. The general contractor had a contract with the Fox River Valley Contractors Association, the Building Trades Employers Association of Green Bay and with the International Hod Carriers and Common Laborers Union.

The County contracted for the plumbing with Arnold G. Zahn of Sturgeon Bay whose three employees were non-union. All the contractors on the job were union except Zahn.

Construction was begun and between June 26 and July 5, 1957, and between July 15 and 25, the defendant Union placed a picket on the sidewalk near the court house addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation "Plumbers Local 298, A F of L, CIO." On the days the picket was there the union employees did not work and at the time of the trial the work had stopped completely.

The trial court found that no labor dispute existed between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of sec. 103.62 (3), Stats.; that the picketing was violative of secs. 103.535, 111.04 and 111.06 (2) (b), Stats., and granted the injunction.

Further facts will be stated in the opinion.

[fol. 42] MARTIN, C. J. It was stipulated that the total cost of the court house addition was $450,000, exclusive of the furniture; of that amount, 35% represented labor on the construction; 15% represented material purchased in Wisconsin; and 50% represented material manufactured outside of the state of Wisconsin. It is admitted that no labor dispute existed, as found by the trial court.

Defendants contend that the picketing was for the sole purpose of informing the union men and the public of the non-union condition. The evidence is practically undisputed that after Zahn entered into his contract, Richard Garot, business representative of Local 298, called on him and asked him to sign a contract with the union "or else there may be a little dispute on the Court House job." Zahn testified he attempted, apparently unsuccessfully, to sublet his contract, and that the Union offered no solution to the work stoppage except that he join.

On cross-examination Garot testified:

"Q. It [the picketing] was also to stop work on the job as long as the non-union plumber contractor was there, wasn't it?

"A. No, sir.

"Q. Didn't you know that would be the effect of the picket?

"A. I thought it might be but I didn't know. That's something nobody knows, I guess . . .

"The Court: When you testified before you said that it has been your experience that when a picket went on a job that the union men would stop work?

"A. That's right."

The trial court found that the picketing was coercive action in itself and amounted to economic pressure and was designed to cause a work stoppage; that it was not confined to advertising the cause of the Union.

In *Teamsters Union* v. *Vogt, Inc.* (on reargument, 1956), 270 Wis. 321a, 74 N. W. (2d) 749, this court held that the "peaceful picketing" carried on by the Union at the entrance to Vogt's gravel pit was for the purpose of coercing [fol. 43] the employer to interfere with its employees in their right to join or refuse to join the Union, contrary to the provisions of sec. 111.06 (2) (b), Stats. and affirmed the granting of the injunction. On appeal (354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. (2d) 1347) the United States supreme court traced the history of the cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. In the course of that discussion the court, by Mr. Justice Frankfurter, stated at p. 289:

"Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'"

It stated that as time went on its "strong reliance on the particular facts in each case demonstrated a growing

awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy;" and that the reassessments of its views "were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation."

"This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." (p. 293)

and quoted from the opinion of the Maine supreme court in *Pappas* v. *Stacey* (1955), 151 Me. 36, 116 Atl. (2d) 497, 500, where it was said:

"'. . . there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing [fol. 44] is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the request of the union.'" (p. 294)

Finally, it held that the policy of Wisconsin enforced by the prohibition of the Vogt picketing is a valid one.

See, also, Retail Fruit Union, AFL-CIO v. NLRB (9th Cir. 1957), 249 Fed. (2d) 591.

It was a fair inference for the trial court to conclude from the evidence in this case that the picketing was for the purpose of coercing the employer to put pressure on the employees to join the Union, in violation of sec. 111.06 (2) (b), Stats.

Defendants attempt to distinguish the *Vogt Case* on the ground that there the picketing was on a country road patronized by only a small part of the public whereas in this case it took place in a city where the traffic by comparison is heavy. The fact that the picketing here would

have more "advertising" value than it did in the *Vogt Case* does not require the conclusion that it was not meant as coercion of the employer. Under the circumstances the inference to be drawn was for the trial court; it properly concluded that the purpose was illegal.

The second question raised on appeal is whether, under the circumstances of this case, the state has jurisdiction. Appellants contend that interstate commerce is affected because 50% of the cost of the construction is for materials manufactured outside of the state, and that the National Labor Relations Act has preempted the field.

What we have here is the County of Door, an arm of the sovereign state of Wisconsin, entering into a contract for the construction of a building which is necessary and essential to the performance of its functions, a place where it can discharge its governmental responsibilities and enforce laws, civil and criminal. It is significant that the National Labor Relations Act defines the term "employer" [fol. 45] as follows:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . or any person subject to the Railway Labor Act . . ." Title 29 U.S.C.A., sec. 152 (2).

The Act further provides:

"The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." Title 29 U.S.C.A., sec. 152 (1).

From this it is evident that the state or any of its political subdivisions is not included within the purview of the National Act.

In *Teamsters Union* v. *N. Y., N. H. & H. R. Co.* (1956), 350 U. S. 155, 160, 76 Sup. Ct. 227, 100 L. Ed. 166, (the so-called "piggy-back" case), the United States supreme court said:

"The N. L. R. B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is

engaged in any proscribed unfair labor practice. Sec. 10 (b). Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N. L. R. B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by sec. 8 (b) (4) (A)."

The implication is that in the case of a political subdivision of a state, which is neither an "employer" nor a "person" under the Act, the N. L. R. B. has no jurisdiction.

Appellants rely on *Weber* v. *Anheuser-Busch, Inc.* (1955), 348 U. S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546, but in that case a strike was the basis of the conduct complained of and it is not applicable here. In *McCarroll* v. [fol. 46] *Los Angeles County Dist. Coun. of Car.* (1957), ... Cal. ....., 315 Pac. (2d) 322, (Cert. denied, March 1958), it was held that (syl. 7):

"It is only strikes used as a weapon in bargaining process that are unfair labor practices within exclusive jurisdiction of National Labor Relations Board."

We are not unmindful of the fact that two of the plaintiffs, Zahn and Oudenhoven, are "employers" under the National Act. However, it is not reasonable to assume that Congress, in enacting the Act, intended in any way to interfere with the governmental function of a sovereign state or its municipalities. This is evident from the distinction made in the "piggy-back" case and from the fact that Congress expressly excluded states and their political subdivisions from its definition of "employer" and did not include them in its definition of "person."

Counsel *amicus curiae* have called our attention to the recent decision in *NLRB* v. *Electrical Workers Local 313,*

34 Labor Cases, para. 71,447, in which the Circuit Court of Appeals for the 3rd Circuit on April 17, 1958 affirmed a decision of the N. L. R. B. in which it found that a county was a "person" within the purview of the National Act and entitled to protection from the activities proscribed by sec. 8 (a) (4) (A). The court said in its opinion:

"A governmental subdivision has no rights of its own; it is only an arm for carrying out the interest of the general public. If some individual or group of individuals has indulged in what the Congress has termed to be an unfair labor practice by which such entity is harmed we see no objection to the public interest being served by stopping the practice although not otherwise subjecting the municipal subdivision to the statutory obligations of an 'employer.' In other words, the majority of the Labor Board took the point of view consistent with recognized public policy.

"The point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.

"The order of the Board will be enforced."

[fol. 47] We are in disagreement with this holding. It has long been held in this state:

"This raises for consideration the question whether a statute of general application containing no specific provision to the effect that the state is within it, applies to the state itself. It is universally held, both in this country and in England, that such statutes do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin* v. *Reis* (1939), 230 Wis. 683, 687, 284 N. W. 580.

See, also, *Milwaukee* v. *McGregor* (1909), 140 Wis. 35, 121 N. W. 642; *State* v. *Milwaukee* (1911), 145 Wis. 131, [fol. 48] 129 N. W. 1101; *Sullivan* v. *School District* (1923), 179 Wis. 502, 191 N. W. 1020; *Fulton* v. *State Security and Investment Board* (1931), 204 Wis. 355, 236 N. W. 120.

In 82 C. J. S., Statutes, sec. 317, p. 554, the rule is stated as follows:

"Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested; and the rule applies, or applies especially, to statutes which would impair or divest the rights, titles, or interests of the government.

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

In 50 Am. Jur., Statutes, sec. 222, p. 199:

"In the process of construing Federal statutes, the general rule is that established rules for the construction of statutes prevail. However, it is a general principle to favor such construction of Federal statues as would give them a uniform application throughout the nation. Moreover, in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests, in the Federal scheme must always be in the background. Federal legislation cannot be construed without regard to the implications of the dual system of government in the United States. The courts should exercise great wariness in the construction of a statute where the problem of construction implicates a phase of federalism and involves striking a balance between national and state authority in a sensitive area of government." See cases there cited.

In *Palmer* v. *Massachusetts* (1939), 308 U. S. 79, 83, 60 Sup. Ct. 34, 84 L. Ed. 93, in an opinion by Mr. Justice Frankfurter, the United States supreme court said:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is

sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

[fol. 49] And in *Trade Comm'n* v. *Bunte Bros.* (1941), 312 U. S. 349, 351, 61 Sup. Ct. 580, 85 L. Ed. 881, in another opinion by Mr. Justice Frankfurter:

"To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases*, 230 U. S. 352, 398-412."

By the Court: Judgment affirmed.

[fol. 50] CURRIE, *J.* (Concurring). There would seem to be no question but that, if it were not for Door county being a party plaintiff, there would be federal preemption here, and state action would be precluded under *Wisconsin E. R. Board* vs. *Chauffeurs, etc., Local 200* (1954), 267 Wis. 356, 366, 66 N. W. (2d) 318. This is because, as pointed out in such case, secs. 158 (a) (3) and 158 (b) (2), 29 USCA, comprising part of the Taft-Hartley amendments to the National Labor Relations Act, make illegal the same type of union activities, where interstate commerce is involved, as does sec. 111.06 (2) (b), Wis. Stats. [fol. 51] The majority opinion grounds its holding, that there is no federal preemption, upon the fact that Door county is not a "person" within the definition of such term as used in the National Labor Relations Act. Such defini-

tion is to be found in sec. 152 (1), 29 USCA.[1] The statute material to the present controversy is sec. 160 (b), 29 USCA, which covers the issuance of a complaint by the National Labor Relations Board charging an unfair labor practice after charges have been filed with such board and an investigation has been made thereof. While the word "person" is employed by such section in describing against whom a complaint is to be issued, such word is not used to describe or limit who may file a charge which may result in the issuance of a complaint.

There is nothing in the National Labor Relations Act which would have precluded Door county from filing a charge against the instant defendants with the National Labor Relations Board. This is pointed out in the dissent filed by Mr. Justice Fairchild. Therefore, it cannot be held that congress has failed to preempt the field because the definition of the word "person" in the National Labor Relations Act does not embrace a state, or an instrumentality thereof such as a county.

However, there is another basis upon which the judgment below may be sustained. A county is an arm or agency of the state and in the erection of a courthouse, [fol. 52] or addition thereto, it is engaged in a governmental function. *Green County* v. *Monroe* (1958), 3 Wis. (2d) 196, 87 N. W. (2d) 827. Under our federal system of government it is implied in the United States constitution that the national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary functions of government. Mr. Justice Brewer, in *South Carolina* v. *United States* (1905), 199 U. S. 437, 451-452, 26 Sup. Ct. 110, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary

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[1] "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress may preempt the field of labor relations as they may affect interstate commerce, the courts of the state under the principle of *South Carolina* v. *United States, supra,* can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith. Both federal and state statutes make the defendants' activities illegal under the findings of fact of the trial court. We would have an entirely different problem if congress had legislated that all peaceful picketing of an employer, who is engaged in a business affecting [fol. 53] interstate commerce, is a valid activity not subject to being enjoined by any court.

The trial court, in addition to finding the activities of the defendants illegal under sec. 111.06 (2) (b), also found that the same violated sec. 103.535 because no "labor dispute" existed under the definition of such term set forth in sec. 103.535. Sec. 103.535 is clearly unconstitutional and void under *American Federation of Labor* v. *Swing* (1941), 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, and *Waukesha* v. *Plumbers & Gas Fitters Local* (1955), 270 Wis. 322, 71 N. W. (2d) 416. See also *Milwaukee Boston Store Co.* v. *Amer. Fed. of H. W.* (1955), 269 Wis. 338, 356-357, 69 N. W. (2d) 762. However, the finding of a violation of sec. 111.06 (2) (b) is sufficient to sustain the judgment below.

For the reasons stated herein I concur in the result.

[fol. 54] FAIRCHILD, *J.* (dissenting). In my opinion the circuit court lacked jurisdiction to enjoin the conduct of appellant union and the judgment ought to be reversed. The peaceful, orderly, one-man, truthful picketing was entirely lawful unless motivated, as found by the court,

to halt construction "to attempt to coerce the plaintiff Arnold G. Zahn to force his employees to organize into a union shop, or in the alternative, to force . . . Zahn to release his contract with the plaintiff County of Door."

The union's conduct affected interstate commerce. This appears from the stipulated fact that material valued at $225,000, manufactured outside Wisconsin, was to be used. The issue of whether the union's conduct was so motivated as to be wrongful was within the exclusive jurisdiction of the National Labor Relations Board. *Wisconsin E. R. Bd.* v. *Chauffeurs, etc., Local 200* (1954) 267 Wis. 356, 366, 66 N.W. 2d 318. Congress has preempted the field as to [fol. 55] conduct with which the national act expressly deals. *Guss* v. *Utah Labor Board* (1957) 353 U.S. 1, 9.

The majority opinion appears to be based upon the proposition that conduct which would be an unfair labor practice under the federal act can be enjoined by a state court if an arm of the state seeks that relief because of damage to its interests. I respectfully conclude that this view is in error in two respects:

(1) It is based upon an assumption that the county is disqualified, under the national act, from arousing the jurisdiction of the national board by filing a charge. Whence does this disqualification arise? It is not from the statute itself, but from a regulation adopted by the national board which provides that a charge may be filed by "any person". Concededly the national act defines "person" in a way that does not expressly include an arm of a state. Nevertheless the only *statutory* pre-requisite to issuance of a complaint by the board is that an unfair labor practice be "charged".

(2) The majority reasons that if a county can not file a charge with the national board, conduct which would be an unfair labor practice affecting interstate commerce may be dealt with by a state court upon complaint of the county. It must be true that the identical conduct is also within the jurisdiction of the national board because Zahn, the employer, and other interested persons, would clearly be qualified to file a charge with the national board. There are issues of fact and law. Opposite and conflicting re-

sults could be reached in the two fora. Congress did not intend that result.

The picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the national act. If mass picketing or violence or overt threats of violence were involved, state action to prevent those things would appear to be proper. *Auto Workers* v. *Wisconsin Board* (1956) 351 U.S. 266, 274. But with violence [fol. 56] absent, and an effect upon interstate commerce present, then the matter is wholly in the field which is now held to be preempted by Congress, and entrusted exclusively to the jurisdiction of the national board.

[fol. 57] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 26, 1958

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fol. 58] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 59] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,
Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G. ZAHN and THEODORE OUDENHOVEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

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Cases Cited.

Statutes Cited.

Miscellaneous Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No .....

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,

Petitioners,

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COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G. ZAHN and THEODORE OUDENHOVEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

Petitioners pray that a Writ of Certiorari issue to review the final judgment of the Wisconsin Supreme Court entered in the above entitled case on June 26, 1958.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Circuit Court for Door County (Tr. 1-3)[1] is unreported and is printed in Appendix A, *infra*, pp. 9-11. The opinion of the Wisconsin Supreme Court (Tr. 39-56) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920, and is reprinted as Appendix B, *infra*, pp. 12-26.

[1] "Tr." refers to the certified transcript filed herein.

JURISDICTION.

The Wisconsin Supreme Court on May 6, 1958, entered a judgment affirming the issuance of a permanent injunction (App. C, *infra*, p. 27) against peaceful picketing being conducted by Petitioners (Tr. 39). A timely motion for rehearing was filed on May 19, 1958, and denied on June 26, 1958 (Tr. 57). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTION PRESENTED.

Whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the county government and two private contractors, in view of the fact that the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2, of the United States Constitution. Article I, Section 8, in material part, provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states . . . And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article VI, Section 2, in material part, provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; . . .

shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

STATEMENT.

Petitioner Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local 298, A. F. of L., is a labor organization having offices in Green Bay, Wisconsin (Tr. 9). Petitioner Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity is an organization composed of representatives of building trades unions in and about Green Bay, Wisconsin (Tr. 9). Petitioners are herein collectively referred to as the "Union."

Respondent County of Door (referred to as the "County") is a municipal corporation (Tr. 8). Respondent Arnold G. Zahn (referred to as "Zahn") is a plumbing contractor residing in Sturgeon Bay, Wisconsin (Tr. 8). Respondent Theodore Oudenhoven (referred to as "Oudenhoven") is a general contractor residing in Kaukauna, Wisconsin (Tr. 8-9).

In March, 1957, the County entered into contracts with Zahn and Oudenhoven, among others, for the performance of work in connection with the construction of an addition to the County's courthouse (Tr. 9). Out-of-state materials valued at $125,000 were used in the construction of the courthouse addition (Tr. 32).

Commencing on June 26, 1957, the Union engaged in peaceful picketing to advertise the non-union status of Zahn's employees (Tr. 10). Employees of union contractors working on the project refused to cross the picket line (Tr. 10).

The District Attorney of the County filed, in the Circuit Court for Door County, a joint complaint on behalf of the

County, Zahn and Oudenhoven (Tr. 3-4) alleging that the Union's picketing was illegal because no labor dispute existed between Zahn and his employees (Tr. 5-6).[2] Answering, the Union denied the material allegations of the complaint (Tr. 6-7) and affirmatively alleged that, pursuant to the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Sec. 151 *et seq.* (refegred to as the "National Act"), exclusive jurisdiction over the subject matter of the controversy was vested in the National Labor Relations Board (referred to as the "Labor Board") (Tr. 7-8).

This defense was rejected by the trial court (Tr. 23) which held that the picketing was unlawful under Section 6 of the Wisconsin Employment Relations Act [Wis. Stats., Sec. 111.06 (2) (b)] in that the Union's purpose was to compel Zahn to interfere with his employees' right of self-organization (Tr. 10-11).[3] A temporary restraining order issued on July 27, 1957 (Tr. 12), was supplanted by a permanent injunction on October 23, 1957 (Tr. 14).

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[2] Wis. Stats., Sec. 103.535, provides:

"It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employes or their representatives."

Wis. Stats., Sec. 103.62 (3), provides:

"The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

[3] The complaint fails to allege any unlawful purpose (Tr. 3-6).

On appeal to the Wisconsin Supreme Court, the Union sought a reversal of the unlawful purpose finding and again asserted that exclusive jurisdiction over the controversy was vested in the Labor Board.

The trial court's finding that the Union's peaceful picketing violated the Wisconsin Employment Relations Act was affirmed (Tr. 42-44; App. B, pp. 14-16). The Wisconsin Supreme Court considered but rejected the contention that exclusive jurisdiction over the controversy was vested in the Labor Board (Tr. 44-49; App. B, pp. 17-21).

The majority below disagreed with the holding of the Labor Board and the United States Court of Appeals for the Third Circuit [*Peter D. Furness*, 117 N. L. R. B. 437, *enf'd* 254 F. 2d 221 (C. A. 3)], which sustained the right of a county government to invoke the procedures of the National Act against union picketing violating the National Act (Tr. 47; App. B, p. 19).

One member of the court, concurring, acknowledged the binding effect of the Labor Board's ruling (Tr. 51; App. B, pp. 22-23); but held that peaceful picketing, in the course of disputes affecting interstate commerce, is not completely regulated under the National Act (Tr. 52-53; App. B, pp. 22-23). Reasoning from this premise, the concurring justice concluded that peaceful picketing which affects governmental construction is subject to restraint pursuant to an application of state law notwithstanding the fact that the dispute affects interstate commerce (Tr. 52-53; App. B, pp. 23-24).

One member of the court, dissenting, concluded that the familiar rules of pre-emption barred state action for "the picketing involved in this action, is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (Tr. 55; App. B, p. 26).

HOW FEDERAL QUESTION IS PRESENTED.

The Union's answer affirmatively alleged that exclusive jurisdiction over the controversy was vested in the Labor Board (Tr. 7-8). This contention was considered and rejected by the trial court (Tr. 2-3) and the Wisconsin Supreme Court (Tr. 44-49).

REASONS FOR GRANTING THE WRIT.

1. Contrary to the decisions of this Court in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, and *Garner v. Teamsters Union*, 346 U. S. 485, the court below asserted jurisdiction to restrain peaceful picketing occurring in the course of a dispute affecting interstate commerce. Here, as in *Garner*, it is claimed that peaceful picketing is subject to state regulation on the theory that the Union, through its picketing, seeks to accomplish an objective unlawful under the state's labor relations act. And, as in *Local Union 25*, state jurisdiction over otherwise pre-empted matters is claimed on the theory that the complaining party is not an "employer" within the meaning of Section 2 (2) of the National Act.[4] The affirmance in *Garner* and reversal in *Local Union 25* resolved both claims in favor of uniform federal regulation and are decisive in this case.

As a direct consequence of this Court's decision in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, the Labor Board, reversing its prior rulings, has held that state and federal governmental agencies and subdivisions are "persons" entitled to invoke the protections of the National Act. *Peter D. Furness*, 117 NLRB 437, *enf'd*,

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[4] Unlike *Local Union 25*, where the only plaintiff was a railroad, Zahn and Oudenhoven, co-plaintiffs below, are "employers" within the meaning of the National Act.

254 F. 2d 221 (C. A. 3); *Freeman Construction Company*, 120 NLRB No. 106. *See also:* 22nd Annual Report (NLRB) 99-100. The court below acknowledged the significance of these decisions to the Union's claim of pre-emption but held that the Labor Board and Court of Appeals for the Third Circuit have erred in their construction of the National Act (Tr. 46-47; App. B, p. 19).[5] On this basis, the court below concluded that state jurisdiction existed. Thus, the present case presents a head-on conflict between federal and state authority. *See: Weber v. Anheuser-Busch*, 348 U. S. 468, 480.

2. Similar conflicts would exist even if the reasoning of concurring member of the court below were accepted. The concurring opinion assumes, contrary to *Garner v. Teamsters Union*, 346 U. S. 485, 499-500, that peaceful picketing in the course of disputes affecting commerce is not totally regulated under the National Act (Tr. 52-53; App. B, p. 24). Moreover, the contention that activities regulated under the National Act are subject to state restraint, where state agencies are involved (Tr. 51-52; App. B. pp. 23-24), was urged and rejected almost ten years ago. *Wisconsin E. R. Board v. Milwaukee G. L. Co.*, 258 Wis. 1, 8, 44 N. W. 2d 547, 551, *rev'd sub nom., Amalgamated Assoc. v. Wisconsin Board*, 340 U. S. 383. *Cf. California v. Taylor*, 353 U. S. 553, 560.

3. In addition to creating needless conflicts between federal and state authority, the judgment below has ramifications national in scope. For example, if the holding below were to gain general acceptance, all labor disputes affecting interstate highway construction would be subject to

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[5] The definitional sections of the National Act and the Wisconsin Employment Relations Act are, in material part, identical; yet the court below envisioned no impediment to the right of a governmental subdivision to invoke the *state* labor relations act. *Compare* 29 U. S. C., Secs. 152 (1)-(2), *with* Wis Stats., Secs. 111.02 (1)-(2).

state regulation. State participation in urban redevelopment, public housing and dam construction projects further demonstrates the importance of this case.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX "A".

MEMORANDUM DECISION FROM THE BENCH.

(TRIAL COURT.)

(Formal Parts Omitted.)

The record in this case clearly establishes that there was no controversy between the plaintiff, Door County, the owner of the court house building to be constructed, and any of the subcontractors or any employees of Door County. The record is equally clear that there was no controversy between the general contractor, as employer, and his employees. The record is clear that there was no controversy between plaintiff Zahn, as employer and plumbing contractor, and either of his two employees.

I am constrained to find that at the time the picket line was established and one picket employed who carried a sign, which action was directed and initiated by Richard Garot, a business representative of the Plumbers, Steamfitters, Petroleum Fitters and Apprentices of Local Union 298, AFL-CIO, the union that Mr. Garot represented was not a representative of any employee and was not the bargaining agent so that they were a party to the contracts or the situation generally that could give rise to a labor dispute.

There being no labor dispute and no situation that could give rise to a labor dispute, the physical presence of the picket from the first time the first picket was placed and occupied a position on the sidewalk outside the courthouse, and the second picket, was coercive action in itself and amounted to economic pressure and was designed to

cause a work stoppage, which did occur. Picketing is not confined to advertising the cause of a union, which they have a perfect right to do under the Fourteenth Amendment, I believe it is, or anyway the freedom of speech, guarantee under the Constitution. There being no labor dispute in this case, the picketing was unlawful picketing as prohibited by Sec. 103.535, Wisconsin Statutes.

The claim that this project was an engagement in interstate commerce because the greater part, in money, of the cost of materials and of the entire project was goods or material manufactured outside of the state, is without merit. I say that it is without merit for these reasons. (1) That by no concept or strained construction of the Interstate Commerce Clause can the construction of a building be called engaging in interstate commerce. (2) The plaintiff, Door County, who is aggrieved in this matter because of the work stoppage on the construction of their courthouse, which they are required under the law to construct, could not, by its very character, engage in interstate commerce. Regardless of the fact this undertaking and this project does not partake of the character of an interstate commerce undertaking, the state courts have jurisdiction to enforce their own statutes against any unlawful act. The Supreme Court of the United States has stated that Congress, in the enactment of the Taft-Hartley Law, did pre-empt certain fields of labor. However, in more recent decisions, the U. S. Supreme Court has made clear that the area of enforcement of the law where substantial rights of citizens of the state are affected by unlawful conduct, that state courts can act, that the legislature can speak and that state courts can enforce injunctions.

This picketing being unlawful, which I find to be the fact, did constitute a violation of the law and a violation of the statute and it is a proper subject of equitable relief.

It follows from what has been said that the temporary injunction will be issued, and a bond of $2,000 to be furnished by the plaintiff, Door County, and filed with the Clerk of Circuit Court of Door County prior to the presentation to the Court and filing of the temporary injunction.

It is ordered that counsel for the plaintiffs prepare and submit to the Court and to opposing counsel formal written findings of fact and conclusions of law consistent with the memorandum decision rendered from the bench.

Dated: July 25, 1957.

APPENDIX "B".

OPINION OF THE COURT.

(WISCONSIN SUPREME COURT.)

(Formal Parts Omitted.)

Appeal from a judgment of the circuit court for Door County: Arold F. Murphy, Circuit Judge, presiding. Affirmed.

Action commenced by plaintiffs County of Door, a municipal corporation, Arnold Zahn and Theodore Oudenhoven against defendants Local 298 of the Plumbers and Steamfitters Union of Green Bay and Building and Construction Trades Council of Green Bay, Wisconsin and Vicinity, for an injunction restraining the defendants, their agents and officers, from picketing the job site at the Door County court house addition in the city of Sturgeon Bay, Wisconsin. From a judgment granting the injunction prayed for, defendants appeal.

Early in 1957 Door County asked for bids on the construction of an addition to the court house at Sturgeon Bay. They were reviewed by the Door County Property and Building Committee and contracts were let to the lowest responsible bidders. On March 1, 1957, the County entered into a general contract with Theodore Oudenhoven for $267,711. The general contractor had a contract with the Fox River Valley Contractors Association, the Building Trades Employers Association of Green Bay and with the International Hod Carriers and Common Laborers Union.

The County contracted for the plumbing with Arnold G. Zahn of Sturgeon Bay whose three employees were non-

union. All the contractors on the job were union except Zahn.

Construction was begun and between June 26 and July 5, 1957, and between July 15 and 25, the defendant Union placed a picket on the sidewalk near the court house addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation, "Plumbers Local 298, A. F. of L., CIO." On the days the picket was there the union employees did not work and at the time of the trial the work had stopped completely.

The trial court found that no labor dispute existed between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of Sec. 103.62 (3), Stats.; that the picketing was violative of Secs. 103.535, 111.04 and 111.06 (2) (b), Stats., and granted the injunction.

Further facts will be stated in the opinion.

Martin, C. J. It was stipulated that the total cost of the court house addition was $450,000, exclusive of the furniture; of that amount, 35% represented labor on the construction; 15% represented material purchased in Wisconsin; and 50% represented material manufactured outside of the State of Wisconsin. It is admitted that no labor dispute existed, as found by the trial court.

Defendants contend that the picketing was for the sole purpose of informing the union men and the public of the non-union condition. The evidence is practically undisputed that after Zahn entered into his contract, Richard Garot, business representative of Local 298, called on him and asked him to sign a contract with the union "or else there may be a little dispute on the Court House job." Zahn testified he attempted, apparently unsuccessfully, to

sublet his contract, and that the Union offered no solution to the work stoppage except that he join.

On cross-examination Garot testified:

"Q. It [the picketing] was also to stop work on the job as long as the non-union plumber contractor was there, wasn't it?

A. No, sir.

Q. Didn't you know that would be the effect of the picket?

A. I thought it might be but I didn't know. That's something nobody knows, I guess . . . .

The Court: When you testified before you said that it has been your experience that when a picket went on a job that the union men would stop work?

A. That's right."

The trial court found that the picketing was coercive action in itself and amounted to economic pressure and was designed to cause a work stoppage; that it was not confined to advertising the cause of the Union.

In *Teamsters Union v. Vogt, Inc.* (on reargument, 1956), 270 Wis. 321a, 74 N. W. (2d) 749, this court held that the "peaceful picketing" carried on by the Union at the entrance to Vogt's gravel pit was for the purpose of coercing the employer to interfere with its employees in their right to join or refuse to join the Union, contrary to the provisions of sec. 111.06 (2) (b), Stats. and affirmed the granting of the injunction. On appeal (354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. [2d] 1347) the United States Supreme Court traced the history of the cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. In the course of that discussion the court, by Mr. Justice Frankfurter, stated at p. 289:

"Cases reached the Court in which a State had designed a remedy to meet a specific situation or to

accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'"

It stated that as time went on its "strong reliance on the particular facts in each case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy;" and that the reassessments of its views "were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation."

"This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy" (p. 293).

and quoted from the opinion of the Maine Supreme Court in *Pappas v. Stacey* (1955), 151 Me. 36, 116 Atl. (2d) 497, 500, where it was said:

"'. . . . there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during non-

compliance by the employees with the request of the union' " (p. 294).

Finally, it held that the policy of Wisconsin enforced by the prohibition of the Vogt picketing is a valid one.

See, also, Retail Fruit Union, AFL-CIO, v. NLRB (9th Cir. 1957), 249 Fed. (2d) 591.

It was a fair inference for the trial court to conclude from the evidence in this case that the picketing was for the purpose of coercing the employer to put pressure on the employees to join the Union, in violation of sec. 111.06 (2) (b), Stats.

Defendants attempt to distinguish the *Vogt Case* on the ground that there the picketing was on a country road patronized by only a small part of the public whereas in this case it took place in a city where the traffic by comparison is heavy. The fact that the picketing here would have more "advertising" value than it did in the *Vogt Case* does not require the conclusion that it was not meant as coercion of the employer. Under the circumstances the inference to be drawn was for the trial court; it properly concluded that the purpose was illegal.

The second question raised on appeal is whether, under the circumstances of this case, the state has jurisdiction. Appellants contend that interstate commerce is affected because 50% of the cost of the construction is for materials manufactured outside of the state, and that the National Labor Relations Act has pre-empted the field.

What we have here is the County of Door, an arm of the sovereign state of Wisconsin, entering into a contract for the construction of a building which is necessary and essential to the performance of its functions, a place where it can discharge its governmental responsibilities and en-

force laws, civil and criminal. It is significant that the National Labor Relations Act defines the term "employer" as follows:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . or any person subject to the Railway Labor Act . . ." Title 29, U. S. C. A., sec. 152 (2).

The Act further provides:

> "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." Title 29, U. S. C. A., sec. 152 (1).

From this it is evident that the state or any of its political subdivisions is not included within the purview of the National Act.

In *Teamsters Union v. N. Y., N. H. & H. R. Co.* (1956), 350 U. S. 155, 160, 76 Sup. Ct. 227, 100 L. Ed. 166 (the so-called "piggy-back" case), the United States supreme court said:

> "The N. L. R. B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice. Sec. 10 (b), Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N. L. R. B. of jurisdiction over controversies otherwise within its competence solely because a railroad

is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by sec. 8 (b) (4) (A)."

The implication is that in the case of a political subdivision of a state, which is neither an "employer" nor a "person" under the Act, the N. L. R. B. has no jurisdiction.

Appellants rely on *Weber v. Anheuser-Busch, Inc.* (1955), 348 U. S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546, but in that case a strike was the basis of the conduct complained of and it is not applicable here. In *McCarroll v. Los Angeles County Dist. Coun. of Car.* (1957), ... Cal. ..., 315 Pac. (2d) 322 (Cert. denied, March, 1958), it was held that (syl. 7):

> "It is only strikes used as a weapon in bargaining process that are unfair labor practices within exclusive jurisdiction of National Labor Relations Board."

We are not unmindful of the fact that two of the plaintiffs, Zahn and Oudenhoven, are "employers" under the National Act. However, it is not reasonable to assume that Congress, in enacting the Act, intended in any way to interfere with the governmental function of a sovereign state or its municipalities. This is evident from the distinction made in the "piggy-back" case and from the fact that Congress expressly excluded states and their political subdivisions from its definition of "employer" and did not include them in its definition of "person."

Counsel amicus curiae have called our attention to the recent decision in *NLRB v. Electrical Workers Local 313*, 34 Labor Cases, para. 71,447, in which the Circuit Court of Appeals for the 3rd Circuit on April 17, 1958, affirmed a decision of the N. L. R. B. in which it found that a county

was a "person" within the purview of the National Act and entitled to protection from the activities proscribed by sec. 8 (a) (4) (A). The court said in its opinion:

> "A governmental subdivision has no rights of its own; it is only an arm for carrying out the interest of the general public. If some individual or group of individuals has indulged in what the Congress has termed to be an unfair labor practice by which such entity is harmed we see no objection to the public interest being served by stopping the practice although not otherwise subjecting the municipal subdivision to the statutory obligations of an 'employer.' In other words, the majority of the Labor Board took the point of view consistent with recognized public policy.
>
> "The point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.
>
> "The order of the Board will be enforced."

We are in disagreement with this holding. It has long been held in this state:

> "This raises for consideration the question whether a statute of general application containing no specific provision to the effect that the state is within it, applies to the state itself. It is universally held, both in this country and in England, that such statutes do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 687, 284 N. W. 580.

See, also, *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N. W. 642; *State v. Milwaukee* (1911), 145 Wis. 131, 129 N. W. 1101; *Sullivan v. School District* (1923), 179

Wis. 502, 191 N. W. 1020; *Fulton v. State Security and Investment Board* (1931), 204 Wis. 355, 236 N. W. 120.

In 82 C. J. S., Statutes, sec. 317, p. 554, the rule is stated as follows:

> "Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested; and the rule applies, or applies especially, to statutes which would impair or divest the rights, titles, or interests of the government.
>
> "The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

In 50 Am. Jur., Statutes, sec. 222, p. 199:

> "In the process of construing Federal statutes, the general rule is that established rules for the construction of statutes prevail. However, it is a general principle to favor such construction of Federal statutes as would give them a uniform application throughout the nation. Moreover, in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests, in the Federal scheme must always be in the background. Federal legislation cannot be construed without regard to the implications of the dual system of government in the United States. The courts should exercise great wariness in the construction of a statute where the problem of construction implicates a phase of federalism and involves striking a balance between national and state authority in a sensitive area of government." See cases there cited.

In *Palmer v. Massachusetts* (1939), 308 U. S. 79, 83, 60 Sup. Ct. 34, 84 L. Ed. 93, in an opinion by Mr. Justice Frankfurter, the United States Supreme Court said:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities, unless Congress gave it. And so we have one of those problems in the reading of a statute wher in meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

And in *Trade Comm'n v. Bunte Bros.* (1941), 312 U. S. 349, 351, 61 Sup. Ct. 580, 85 L. Ed. 881, in another opinion by Mr. Justice Frankfurter:

> "To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases*, 230 U. S. 352, 398-412."

By the Court: Judgment affirmed.

CONCURRING OPINION.

WISCONSIN SUPREME COURT.

(Formal Parts Omitted.)

Currie, J. (concurring.) There would seem to be no question but that, if it were not for Door county being a party plaintiff, there would be federal pre-emption here, and state action would be precluded under Wisconsin E. R. Board v. Chauffeurs, etc., Local 200 (1954), 267 Wis. 356, 366, 66 N. W. (2d) 318. This is because, as pointed out in such case, secs. 158 (a) (3) and 158 (b) (2), 29 USCA, comprising part of the Taft-Hartley amendments to the National Labor Relations Act, make illegal the same type of union activities, where interstate commerce is involved, as does sec. 111.06 (2) (b), Wis. Stats.

The majority opinion grounds its holding, that there is no federal pre-emption, upon the fact that Door county is not a "person" within the definition of such term as used in the National Labor Relations Act. Such definition is to be found in sec. 152 (1), 29 USCA.[1] The statute material to the present controversy is sec. 160 (b), 29 USCA, which covers the issuance of a complaint by the National Labor Relations Board charging an unfair labor practice after charges have been filed with such board and an investigation has been made thereof. While the word "person" is employed by such section in describing against whom a complaint is to be issued, such word is not used to describe or limit who may file a charge which may result in the issuance of a complaint.

There is nothing in the National Labor Relations Act which would have precluded Door county from filing a

[1] "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

charge against the instant defendants with the National Labor Relations Board. This is pointed out in the dissent filed by Mr. Justice Fairchild. Therefore, it cannot be held that congress has failed to pre-empt the field because the definition of the word "person" in the National Labor Relations Act does not embrace a state, or an instrumentality thereof such as a county.

However, there is another basis upon which the judgment below may be sustained. A county is an arm or agency of the state and in the erection of a courthouse, or addition thereto, it is engaged in a governmental function. *Green County v. Monroe* (1958), 3 Wis. (2d) 196, 87 N. W. (2d) 827. Under our federal system of government it is implied in the United States constitution that the national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary function of government. Mr. Justice Brewer, in *South Carolina v. United States* (1905), 199 U. S. 437, 451-452, 26 Sup. Ct. 110, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:

> "Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress may pre-empt the field of labor relations as they may affect interstate commerce, the courts of the state

under the principle of *South Carolina v. United States*, *supra*, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith. Both federal and state statutes make the defendants' activities illegal under the findings of fact of the trial court. We would have an entirely different problem if congress had legislated that all peaceful picketing of an employer, who is engaged in a business affecting interstate commerce, is a valid activity not subject to being enjoined by any court.

The trial court, in addition to finding the activities of the defendants illegal under sec. 111.06 (2) (b), also found that the same violated sec. 103.535 because no "labor dispute" existed under the definition of such term set forth in sec. 103.535. Sec. 103.535 is clearly unconstitutional and void under *American Federation of Labor v. Swing* (1941), 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, and *Waukesha v. Plumbers & Gas Fitters Local* (1955), 270 Wis. 322, 71 N. W. (2d) 416. See also *Milwaukee Boston Store Co. v. Amer. Fed. of H. W.* (1955), 269 Wis. 338, 356-357, 69 N. W. (2d) 762. However, the finding of a violation of sec. 111.06 (2) (b) is sufficient to sustain the judgment below.

For the reasons stated herein I concur in the result.

DISSENTING OPINION.

(WISCONSIN SUPREME COURT.)

(Formal Parts Omitted.)

Fairchild, J. (dissenting). In my opinion the circuit court lacked jurisdiction to enjoin the conduct of appellant union and the judgment ought to be reversed. The peaceful, orderly, one-man, truthful picketing was entirely law-

ful unless motivated, as found by the court, to halt construction "to attempt to coerce the plaintiff Arnold G. Zahn to force his employees to organize into a union shop or, in the alternative, to force . . . Zahn to release his contract with the plaintiff County of Door."

The union's conduct affected interstate commerce. This appears from the stipulated fact that material valued at $225,000, manufactured outside Wisconsin, was to be used. The issue of whether the union's conduct was so motivated as to be wrongful was within the exclusive jurisdiction of the National Labor Relations Board. *Wisconsin E. R. Bd. v. Chauffeurs, etc., Local 200* (1954), 267 Wis. 356, 366, 66 N. W. 2d 318. Congress has pre-empted the field as to conduct with which the national act expressly deals. *Guss v. Utah Labor Board* (1957), 353 U. S. 1, 9.

The majority opinion appears to be based upon the proposition that conduct which would be an unfair labor practice under the federal act can be enjoined by a state court if an arm of the state seeks that relief because of damage to its interests. I respectfully conclude that this view is in error in two respects:

(1) It is based upon an assumption that the county is disqualified, under the national act, from arousing the jurisdiction of the national board by filing a charge. Whence does this disqualification arise? It is not from the statute itself, but from a regulation adopted by the national board which provides that a charge may be filed by "any person." Concededly the national act defines "person" in a way that does not expressly include an arm of a state. Nevertheless the only *statutory* pre-requisite to issuance of a complaint by the board is that an unfair labor practice be "charged."

(2) The majority reasons that if a county cannot file a charge with the national board, conduct which would be

an unfair labor practice affecting interstate commerce may be dealt with by a state court upon complaint of the county. It must be true that the identical conduct is also within the jurisdiction of the national board because Zahn, the employer, and other interested persons, would clearly be qualified to file a charge with the national board. There are issues of fact and law. Opposite and conflicting results could be reached in the two fora. Congress did not intend that result.

The picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the national act. If mass picketing or violence or overt threats of violence were involved, state action to prevent those things would appear to be proper. *Auto Workers v. Wisconsin Board* (1956), 351 U. S. 266, 274. But with violence absent, and an effect upon interstate commerce present, then the matter is wholly in the field which is now held to be preempted by Congress, and entrusted exclusively to the jurisdiction of the national board.

APPENDIX "C."

JUDGMENT AND ORDER FOR PERMANENT INJUNCTION.

(Formal Parts Omitted.)

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates and all of the officers and members of said defendant labor organization, be perpetually enjoined and restrained from picketing, or perpetrating any action amounting to picketing, on the job site known as the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Dated this 23rd day of October, 1957, at Green Bay, Wisconsin.

By the Court:

/s/ Arold F. Murphy,
Arold F. Murphy,
Judge Presiding.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 396.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,
Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR PETITIONERS.

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INDEX.

Cases Cited.

Statutes Cited.

United States Constitution.

Miscellaneous Cited.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The memorandum opinion of the Circuit Court for Door County (R. 1) is unreported. The opinion of the Wisconsin Supreme Court (R. 24) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920.

JURISDICTION.

The Wisconsin Supreme Court on May 6, 1958, entered a judgment affirming the issuance of a permanent injunction against peaceful picketing being conducted by Petitioners (R. 34). A timely motion for rehearing was filed on May 19, 1958, and denied on June 26, 1958 (R. 38). The jurisdiction of this Court rests on 28 U. S. C., Sec. 1257 (3).

QUESTION PRESENTED.

Whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the county government and two private contractors, where the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2, of the United States Constitution. Article I, Section 8, in material part, provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article VI, Section 2, in material part, provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The statutory provisions primarily involved are Sections 2 (1)-(2), 8 (b) (4) (A) and (B) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C., Sec. 151 et seq. (referred to as the "National Act"). These sections of the National Act, together with all others cited, are printed in Appendix A of this brief.

STATEMENT.

Petitioner Plumbers, Steamfitters, Refrigerator, Petroleum Fitters, and Apprentices of Local 298, A. F. of L., is a labor organization having offices in Green Bay, Wisconsin (R. 7). Petitioner Building and Construction Trades Council of Green Bay, Wisconsin, and vicinity is an organization composed of representatives of building trades unions in and about Green Bay, Wisconsin (R. 7). Petitioners are collectively referred to as the "Union".

Respondent, County of Door (referred to as the "County"), is a municipal corporation (R. 6). Respondent Arnold G. Zahn (referred to as "Zahn") is a plumbing contractor residing in Sturgeon Bay, Wisconsin (R. 6). Respondent Theodore Oudenhoven (referred to as "Oudenhoven") is a general contractor residing in Kaukauna, Wisconsin (R. 6).

In March, 1957, the County entered into contracts with Zahn and Oudenhoven, among others, for the performance

of work in connection with the construction of an addition to the County's courthouse (R. 7). Out-of-state materials valued at $225,000 were used in the construction of the courthouse addition (R. 22).

Commencing on June 26, 1957, the Union engaged in peaceful picketing to advertise the non-union status of Zahn's employees (R. 7). Employees of union contractors working on the project refused to cross the picket line (R. 7-8).

The District Attorney of the County filed, in the Circuit Court for Door County, a joint complaint on behalf of the County, Zahn and Oudenhoven (R. 3), alleging that the Union's picketing was illegal because no labor dispute existed between Zahn and his employees (R. 4). Answering, the Union denied the material allegations of the complaint (R. 5) and affirmatively alleged that, pursuant to the National Act, exclusive jurisdiction over the subject matter of the controversy was vested in the National Labor Relations Board (referred to as the "Labor Board") (R. 6).

This defense was rejected by the trial court (R. 2), which held that the picketing was unlawful under Section 6 (2) (b) of the Wisconsin Employment Relations Act, Wis. Stats., Sec. 111.06 (2) (b) (1955), in that the Union's purpose was to cause a work stoppage and thereby compel Zahn to interfere with his employees' right of self-organization (R. 8)[1]. A temporary restraining order, is-

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[1] Section 111.06 (2) (b) provides:

"It shall be an unfair labor practice for any employe individually or in concert with others: * * *

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would

sued on July 27, 1957 (R. 9), was followed by a permanent injunction on October 23, 1957 (R. 10).

On appeal to the Wisconsin Supreme Court, the Union sought a reversal of the unlawful purpose finding and again asserted that exclusive jurisdiction over the controversy was vested in the Labor Board. The trial court's finding that the Union's peaceful picketing violated Section 6 (2) (b) of the Wisconsin Employment Relations Act was affirmed (R. 30). The Wisconsin Supreme Court considered but rejected the contention that exclusive jurisdiction over the controversy was vested in the Labor Board (R. 30-34).

The majority below disagreed with the holding of the Labor Board and the United States Court of Appeals for the Third Circuit in *Peter D. Furness*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3), which sustained the right of a county government to invoke the procedures of the National Act against union picketing violating the National Act, and demonstrates the Labor Board's jurisdiction in this type of case (R. 32).

One member of the court, concurring, acknowledged the binding effect of the Labor Board's ruling (R. 35), but held that peaceful picketing, in the course of disputes affecting interstate commerce, is not completely regulated under the National Act (R. 36). Reasoning from this

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constitute an unfair labor practice if undertaken by him on his own initiative."

Section 111.04 provides:

"*Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing; and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

premise, the concurring justice concluded that peaceful picketing which affects governmental construction is subject to restraint pursuant to an application of state labor law notwithstanding the fact that the dispute affects interstate commerce (R. 36).

One member of the court, dissenting, concluded that the familiar rules of pre-emption barred state action for "the picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (R. 38).

The case is here on writ of certiorari.

SUMMARY OF ARGUMENT.

This proceeding involves the familiar question of the extent of federal preemption over labor controversies affecting interstate commerce. Specifically, the issue is whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the County and two private contractors, where the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

Had the dispute arisen while the employers involved were engaged in the construction of a privately owned building, state jurisdiction would have been preempted under this Court's decision in *San Diego Building Trades Council v. Garmon*, 353 U. S. 26. The joinder of the County, an entity excluded from the National Act's definition of an "employer," as a co-plaintiff does not alter the nature of the dispute. Nor does such joinder revive otherwise preempted state jurisdiction. *Cf. Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155. If the County had filed charges with the Labor Board, the Board's jurisdiction would have been effectively invoked. *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd, sub nom., NLRB v. Electrical Workers, Local No. 313*, 254 F. 2d 221 (C. A. 3). Of course, either of the two employers involved could have filed similar charges.

Reduced to its essential elements, this case poses the same question considered in *Local Union No. 25*. There, as here, intertwined but distinct Congressional policies could be fully implemented only by reaffirming the exclusive jurisdiction of the Labor Board to regulate disputes within its statutory authority. The recognition of exclusive Labor Board jurisdiction, in the circumstances of this case, does not, however, imply that the jurisdiction of the

states to adopt whatever labor policies the state deems proper with respect to state employees is in any way diminished.

A state may avoid the impact of federal regulation in the field of labor relations by employing, directly, the employees needed to perform the work which the state desires to accomplish. In the instant case, the state elected to utilize the services of private employers and their employees. Having done so, the state must accept the complex of federally imposed rights and duties which circumscribe the activities of the contractor, his employees, and the unions representing employees in the trade.

The dispute involved in this case was one over which the Labor Board is empowered and directed to exercise jurisdiction. Neither the express provisions of the National Act nor its legislative history suggest that the exclusive jurisdiction of the Labor Board is dependent upon the *locus in quo* of the dispute. Rather, the narrowly limited terms of Section 2 (2)-(3), conserving state jurisdiction to regulate the employment relationship of state employees, indicates a clear intent to pre-empt state jurisdiction where, as here, state employees are not involved.

Moreover, if state jurisdiction were recognized in the circumstances of this case, a vital segment of the construction industry now covered by the National Act would be subject to concurrent and inevitably conflicting regulation.

ARGUMENT.

The Regulation of Peaceful Picketing Occurring in the Course of Disputes Between Employers and Labor Organizations Has Been Totally Pre-empted by the National Act Where, as Here, the Dispute Affects Interstate Commerce. Such Pre-emption Exists Notwithstanding the Fact That a State Agency Joins, as a Co-plaintiff in Subsequent Litigation, With the Employers Involved in the Dispute.

But for the fact that the picketing involved in this case took place at the premises of a county building project, the judgment below would be squarely foreclosed by the prior decisions of this Court (e. g., *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155; *Garner v. Teamsters Union*, 346 U. S. 485). Hence, the critical question is whether otherwise pre-empted state jurisdiction is revived where, as here, a dispute between a labor organization and a private employer affects a public construction project. Before discussing this question, several subsidiary issues raised by the opinions below are considered.

A. The dispute involved potential violations of Section 8 (b) (4) (A) and (B), and affected interstate commerce.

Materials manufactured outside the state of Wisconsin, having a value of $225,000, were utilized in the course of the building project affected by the dispute in this case (R. 22). Although the trial court held that the dispute did not affect interstate commerce (R. 2), its finding in this regard was not adopted by the Wisconsin Supreme Court. Both the majority (R. 30-34) and concurring (R. 34-36) opinions in the court below assume that the dispute affected interstate commerce. The contrary view of the trial court was properly rejected. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 683-684.

In view of the substantial value of the materials manufactured outside the state which were used on the project, it may be fairly inferred that some of the employers involved were subject to the Labor Board's jurisdictional standards. Since potential violations of Section 8 (b) (4) were involved, the interstate business of both the primary and the secondary employers is to be considered. *Samuel Langer*, 82 N. L. R. B. 1028, 1033-1038, *aff'd sub nom., NLRB v. Electrical Workers*, 341 U. S. 694, 699. *See also: Euclid Foods, Inc.*, 118 N. L. R. B. 130, 131; *McAllister Transfer, Inc.*, 110 N. L. R. B. 1789, 1772.

In any event, it is clear that the applicability of the federal pre-emption doctrine is not dependent upon a finding that the employer involved meets the Labor Board's dollar volume jurisdictional standards. *Guss v. Utah Labor Board*, 353 U. S. 1.

In substance, the courts below viewed the picketing as an attempt by the Union to induce a work stoppage by the employees of neutral subcontractors for the ultimate purpose of compelling Zahn to recognize the Union as the representative of his employees (R. 28). These findings, if made by the Labor Board, would bring the case squarely within the prohibitions of Section 8 (b) (4) (A) and (B) of the National Act. *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3).

Hence, it is clear that the picketing constituted an alleged "unfair labor practice (listed in section 8) affecting commerce" which, under Section 10 (a), "the Board is empowered . . . to prevent." Under this Court's decisions state regulation of such disputes affecting *private* construction is foreclosed. *San Diego Building Trades Council v. Garmon*, 353 U. S. 26; *Pocatella Building Trades Council v. Elle*, 352 U. S. 884; *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. As

will be demonstrated below, a different rule should not be adopted for cases in which the dispute affects *public* construction.

B. The exclusive jurisdiction of the Labor Board over peaceful picketing includes jurisdiction over picketing occurring in the course of disputes, between employers and labor organizations, which affect public construction projects.

1. Federal pre-emption applies even though a neutral affected by the dispute is not an "employer" as defined in the National Act.

Here, conduct falling squarely within the area regulated by Section 8 (b) (4) (A) and (B) of the National Act has been enjoined by a state court pursuant to an application of a state labor relations act notwithstanding the fact that the dispute was one affecting interstate commerce. The dispute was precipitated by the non-union status of Respondent Zahn, a private employer performing construction work on a public construction project. The work stoppage, allegedly caused by the picketing, was engaged in by employees of private employers who were also performing services on the project.

Thus, if either of the two employers involved in this case had filed unfair labor practice charges with the Labor Board, the jurisdiction of that tribunal would have been effectively invoked. As in *Garner v. Teamsters Union*, 346 U. S. 485, 488, we do not have "an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which, therefore, either is 'governable by the state or is entirely ungoverned.' "

Moreover, under the authority of this Court's decision in *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, the Respondent, Door County, could have

invoked the procedures of the National Act either by filing an independent charge or by filing a joint charge with the private employers involved in the dispute.

In *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, a state court injunction was issued against peaceful picketing occurring at a railroad loading site. The state courts rejected a claim of federal pre-emption reasoning that the express exclusion of railroads as employers under the National Act thereby divested the Labor Board of jurisdiction over controversies affecting such entities. On writ of certiorari, the state court judgment was reversed.

In *Local Union No. 25*, this Court pointed out that, while the labor relations of railroads *vis-a-vis* their employees was excluded from the Labor Board's jurisdiction, such exclusion did not "divest the National Labor Relations Board of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by Section 8 (b) (4) (A)." 350 U. S. at 160.

As a direct consequence of this ruling, the Labor Board, with the approval of the Court of Appeals for the Third Circuit, held that the County of New Castle, Delaware, was entitled to the protection of Section 8 (b) (4) (A) and (B). *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers Local 313*, 254 F. 2d 221 (C. A. 3). There, as here, the County was engaged in a construction project which was halted by union picketing precipitated by the presence of a non-union subcontractor on the job. In exercising jurisdiction over the dispute, the Labor Board stated (117 N. L. R. B. at 441):

"Thus the court [in *Local Union No. 25 v. New York, New Haven Railway Co.* 350 U. S. 155] ex-

plicitly pointed out that Congress' failure to specifically exclude railroads (and *a fortiori* political subdivisions) from the definition of the term 'person' as used in Section 2 (1) did not disqualify such entities from the Act's protection against secondary pressures."

Accord:

Freeman Construction Co., 120 N. L. R. B. No. 106;
New Mexico Branch, Assoc. General Contractors, 120 N. L. R. B. No. 58.

Cf.

NLRB v. Springfield Building Trades Council, 43 L. R. R. M. 2320 (C. A. 1);
22nd National Labor Relations Board Annual Report, 99-100.

The court below, in holding that the Labor Board and the Court of Appeals have erred in their construction of the National Act, relied primarily upon state decisions holding that the governmental agencies are impliedly excluded from the coverage of statutes of general application. Reference to several decisions of this Court was also made (R. 32-34).

However, the court below gave no consideration to the frequent occasions upon which it has been held that statutes of general application encompass state agencies within the ambit of the statutory term "person." This Court has not hesitated to apply federal statutes to state agencies where, as here, the subject matter regulated and the scheme of the statute itself supported such a construction. This has been done even though the statute in question did not refer specifically to state agencies. *California v. United States*, 320 U. S. 557, 585-586; *Georgia v. Evans*, 316 U. S. 159, 161-163; *Case v. Bowles*, 327 U. S. 92, 98-100; *United States v. California*, 297 U. S. 175, 185-187;

Ohio v. Helvering, 292 U. S. 360, 370; *South Carolina v. United States*, 199 U. S. 437, 448.

Benz v. Compania Naviera Hidalgo, 353 U. S. 138, is not to the contrary. *Benz* held only that the National Act does not apply "to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by a foreign crew under foreign articles. . . ." 353 U. S. at 139. In the instant case, the controversy involved disputants over whom the Labor Board is empowered and directed to exercise jurisdiction.

The reasoning of the court below closely parallels that urged in *California v. Taylor*, 353 U. S. 553, where the state sought to escape the applicability of the Railway Labor Act by reliance on the rule that a federal statute is presumed not to restrict a constituent sovereign state unless it expressly so provides. Rejecting that contention (353 U. S. at 562):

> "This court said that this presumption 'is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated.' [*United States v. California*, 297 U. S. 175, 186.]"

Significantly, the court below, without discussion, permitted a state agency to invoke the proscriptions of the state labor relations act against the picketing involved in this case even though the crucial definitional sections of the state and federal law are in all material respects the same.[2] It would appear, therefore, that the court below

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[2] Wis. Stats., Section 111.02, in material part, provides that:

"When used in this subchapter:

"(1) The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees or receivers.

"(2) The term 'employer' means a person who engages the services of an employe, and includes any person acting on be-

was primarily concerned with conserving jurisdiction to regulate alleged unfair labor practices. Had the strike been lawful in the view of the court below, no injunction would have been permitted. Yet, the same interference with the progress of the construction job would have resulted irrespective of the legality of the union's objective.

Under the decisions of this Court, the Court of Appeals, and the Labor Board, municipal corporations are entitled to protections of Section 8 (b) (4) (A) and (B) of the National Act. The only contrary view expressed to date is that of the court below. Thus, this case demonstrates perhaps more clearly than any other heretofore decided, the potentialities for conflict inherent in the exercise of the concurrent jurisdiction by federal and state tribunals over conduct regulated by the National Act.

In view of the holdings discussed above, we submit that the court below erred when it refused to follow the decision of the Labor Board in *Peter D. Furness*, 117 N. L. R. B. 437, *enf. sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3), with respect to the scope of the National Act's coverage. *Cf., Tacoma v. Tax Payers of Tacoma*, 357 U. S. 320, 336, 337. The Labor Board's decision in the *Electrical Workers* case follows inescapably from the previous ruling of this Court in *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155. Since either the County or the employers affected were entitled to file an unfair labor practice charge with the Labor Board, this case is one falling within the exclusive jurisdiction of that tribunal.

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half of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact."

2. Reconciliation of competing interests of employees, employers and of the states with the express provisions of the National Act requires the application of federal pre-emption to the dispute involved in this case.

The Labor Board's construction of the National Act, pursuant to which the protection of Section 8 (b) (4) is extended to state agencies, is the only permissible construction if the competing interests of employees, employers and state agencies are to be reconciled with the express provisions of the National Act. Certainly, Section 7 rights guaranteed employees whose employers are engaged in commerce should not be diluted merely because their employer successfully bid on a highway or courthouse job. Nor should the complex of federal rights enjoyed by employers be affected by the vagaries of competitive job bidding. Contrariwise, the National Act should not be construed in a manner which will impinge upon the state's right to deal with its own employees in the manner dictated by local policy.

Accommodation of these competing policies is achieved by the Labor Board's construction of the National Act. Cogently similar considerations caused this Court to state in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, 160-161, that:

> "This interpretation permits the harmonious effectuation of three distinct congressional objectives: (1) to provide orderly and peaceful procedures for protecting the rights of employers, employees and the public in labor disputes so as to promote the full, free flow of commerce, as expressed in section 1 (b) of the Labor Management Relations Act; (2) to maintain the traditional separate treatment of employer-employee relationships of railroads subject to the Railway Labor Act; and (3) to minimize diversities and conflicts likely to result from a variety of local pro-

cedures and attitudes toward labor controversies.' *Garner v. Teamsters Union*, 346 U. S. 485, 490."

The same "effectuation of . . . distinct congressional objectives" can be accomplished in this case only if the Labor Board's construction of the National Act is accepted and the states precluded from exercising concurrent jurisdiction over labor disputes such as the one involved in this case.

3. The carefully limited areas of state jurisdiction unaffected by the National Act evidence a Congressional intent to preclude concurrent regulation of peaceful picketing occurring in the course of disputes affecting public construction projects.

The permissible areas of state participation in the administration of federal labor policy was carefully considered by the Congress when it enacted the 1947 amendments to the National Act. Thus, Sections 2 (3), 10 (a), 14 (b), 202 (c) and 203 (b) of the National Act define, in precise terms, areas in which state jurisdiction is unaffected by the National Act. Except for those areas in which state jurisdiction is expressly saved by the National Act, it must be concluded that state regulation is barred. For, as this Court observed in *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, 398:

> "Congress knew full well that its labor legislation 'preempts the field that the Act covers in so far as commerce within the meaning of the Act is concerned [H. R. Rep. 245, 80th Cong., 1st Sess., p. 44 (1947] and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative [* * * Sections 2 (2) and 2 (3) of the Federal Act . . . specifically exclude from its operation the employees of 'any state or political subdivision thereof']."

The National Act itself, in Section 2 (3), and the legislative debates (93 Cong. Rec. 6686, 7000-7001), evidence the care with which Congress avoided any attempt to regulate, under the National Act, labor relations controversies between excluded employers and their employees. However, a similar exclusion of disputes between employers and labor organizations covered by the National Act, which may affect an excluded employer, is not to be found in the National Act.

The concurring opinion below concedes that "if it were not for Door County being a party plaintiff, there would be federal preemption here . . ." (R. 34). Yet the same opinion seeks to sustain state jurisdiction on the theory that "national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary functions of government" (R. 35-36).

Thus, the concurring opinion both concedes and overlooks the undisputed power of Congress to regulate the conduct of labor disputes between private employers and labor organizations which affect interstate commerce. *NLRB v. Jones & L. Steel Corp.*, 301 U. S. 1, 30-32. Since the power of Congress to regulate such conduct is firmly established, the only remaining question is whether Congress has exercised its power with the intention of precluding concurrent state regulation. As demonstrated above, Congress has manifested an unmistakable intention to exclude concurrent regulation over disputes of the type involved in this case.

Of course, a state agency can avoid the impact of federal regulation by hiring, directly, craftsmen to perform the construction work which the state wishes to accomplish. *Paper Makers Importing Co.*, 116 N. L. R. B. 267. But where, as here, the state agency engages private employers and their employees to perform the work, it must accept the complex of rights and duties imposed by the National

Act upon the employer, his employees, and labor organizations engaged in representing employees in the craft.

Moreover, several erroneous assumptions underlie the analysis of the concurring justice below. First, the concurring opinion assumes that the participation of Door County as a co-plaintiff renders the doctrine of federal pre-emption inapplicable (R. 34). As *Garner v. Teamsters Union*, 346 U. S. 485, 498, teaches, this is not the case:

> "The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent."

See also:

Weber v. Anheuser-Busch, 348 U. S. 468, 479-480.

Second, the opinion assumes that labor disputes between employers and labor organizations subject to the National Act are amenable to regulation under a state labor act if, in the state's view, the dispute affects an important state function. The same reasoning was urged and rejected in *Wisconsin E. R. Board v. Milwaukee G. L. Co.*, 258 Wis. 1, 8, 44 N. W. 2d 547, 551, *rev'd sub nom., Amalgamated Assoc. v. Wisconsin Board*, 340 U. S. 383.

Third, the concurring opinion concedes the right of the county to obtain a remedy under the National Act but asserts that the applicability of the doctrine of pre-emption would "prevent the state . . . from discharging its ordinary functions of government" (R. 35-36). Whatever weight this argument might otherwise have is completely dissipated by the fact that the sole basis for enjoining the picketing was its unlawfulness under the state labor act. Precisely the same result or interference will flow from a primary strike for higher wages by a contractor's employees or from a similar strike by the employees of an essential supplier.

As the dissenting justice below observed, "the picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (R. 38). We respectfully submit that the considerations summarized above demonstrate that state jurisdiction, in this case, cannot be supported either by the reasoning of the majority or the concurring justice below.

4. The existence of concurrent power in state tribunals to regulate such disputes would result in conflicting labor policies in a vast area now covered by the National Act.

During the calendar year 1957, over 48 billion dollars worth of construction work was performed in the United States. Of this 48 billion dollars, over 14 billion dollars worth of construction, or almost 30% of the total, consisted of public construction financed by federal and state governments. Expenditures for highway construction, public housing, and public buildings constitute an important part of the total value of public construction. 81 Monthly Labor Review 1214. *Cf.* Note, *"Special Labor Problems in the Construction Industry,"* 10 Stan. L. Rev. 525, 526-530 (1958).

If state tribunals are permitted to exercise concurrent jurisdiction over disputes between employers and labor organizations which affect public construction projects, 30% of a 48 billion dollar industry, now covered by the National Act, will be subjected to divergent and conflicting labor policies. Such potentialities for conflict provide the underlying reason for the "general intent to pre-empt the field" and the "proviso to Section 10 (a) with its inescapable implication of exclusiveness" which were held to exclude state jurisdiction in *Guss v. Utah Labor Board*, 353 U. S. 1, 10.

C. Since any of the employers affected by the dispute could have filed charges under the National Act, the state court had no jurisdiction to proceed in the instant case irrespective of the right of a governmental subdivision to invoke the procedures of the National Act.

Even if the National Act were construed to bar state and federal agencies from invoking its protections, the judgment below nevertheless should be reversed. Following *Garner v. Teamsters*, 346 U. S. 485, this Court has had eleven occasions to directly consider the question of whether state courts have jurisdiction to regulate peaceful picketing where the picketing occurs in the course of the dispute affecting interstate commerce. In each of these cases it has been held that state jurisdiction has been preempted. *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131; *District Lodge 34 v. Cavett Co.*, 355 U. S. 39; *Electrical Workers Local 429 v. Farnsworth & Chambers Co.*, 353 U. S. 969; *San Diego Building Trades v. Garmon*, 353 U. S. 26; *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U. S. 20; *Retail Clerks Union v. J. J. Newberry Co.*, 352 U. S. 987; *Pocatello Building Trades Council v. Elle*, 352 U. S. 884; *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62; *Local Union 25 v. New York, New Haven Railroad*, 350 U. S. 155; *Weber v. Anheuser-Busch*, 348 U. S. 468; *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

These decisions recognize that in the area of peaceful picketing, as in the instance of representation elections, "a case-by-case test of federal supremacy" is not permissible. *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767, 776. Expression of this principle is found in *Garner* (346 U. S. at 499-500):

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the

National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

In view of the total pre-emption of the field of peaceful picketing the correctness of the judgment below does not turn upon the right of a state agency to invoke the procedures of the National Act. The dispute involved in this case was one between parties subject to the jurisdiction of the Labor Board. The dispute was one over which the Labor Board is empowered and directed by the Congress to exercise jurisdiction. Concurrent state regulation, if permitted, will inevitably lead to chaos in the construction industry.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

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APPENDIX.

Section 2 (1) (2) of the Act provides:

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 7 of the Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (b) (4) (A) and (B) of the Act provides:

"It shall be an unfair labor practice for a labor organization or its agents——

* * * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

* * *"

Section 10 (a) of the Act provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 14 (b) of the Act provides:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Section 202 (c) of the Act provides:

"The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year."

Section 203 (b) of the Act provides:

"The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its

judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 208, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,
Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A.F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,

Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The memorandum opinion of the Circuit Court for Door County (R. 1) is unreported. The opinion of the Wisconsin Supreme Court (R. 24) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920.

STATUTES CITED

The federal statutory provisions are primarily sections 2 (1) (2), 8 (b) (4) (A) and (b) of the National Labor Relations Act.

The Wisconsin statutes involved are sections 59.01, 59.08 (1), 66.29 (6) and 134.01. These statutes are printed in Appendix A of this brief.

STATEMENT

Respondent agrees with the statement of the petitioners and amicus curiae, but presents the following additional facts:

Door County, through the Property and Building Committee of the Door County Board, let the contracts for the construction of the courthouse addition to the low bidders (R. 11). The Property and Building Committee was authorized to take charge of construction by the County Board (R. 14).

The business agent of Plumbers' Local 298 was given authority, by action on a motion at a regular union meeting, to place a picket on any job where there is a non-union plumber working on the job (R. 19). It was known to the union agent that when a picket was put on a job, the job stops. (R. 19).

The trial court found that the picketing was coercive and amounted to economic pressure, and was designated to cause a work stoppage (R. 12).

There was no controversy between the general contractor and his employees (R. 16) and no controversy between Zahn, the plumbing contractor, and his employees (R. 18), and the court so found (R. 1).

QUESTIONS PRESENTED

In addition to the question presented in the brief of the petitioners and the question presented in the brief of the National Labor Relations Board, Amicus Curiae, the following questions are raised by this appeal:

1. Does our federal scheme authorize Congress to pre-empt the field of law designed by a State to protect the essential functions of government of the State or an agency thereof?

2. Has Congress attempted to pre-empt labor disputes which interfere with the execution of essential governmental functions of a State or an agency thereof?

3. Is the area of essential governmental functions of a State, or Agencies thereof, at most, subject to concurrent jurisdiction of the Board and State agencies and courts?

SUMMARY OF ARGUMENT

The statutes of the State of Wisconsin regulate the procedure for letting contracts for municipal construction and apply to the courthouse construction which was picketed. The courthouse was essential to the governmental functions of the State of Wisconsin, and therefore regulation of picketing of such courthouse construction cannot be controlled by the jurisdictional standards set up by the National Labor Relations Board.

The NLRB vs. Local 313 Electrical Workers case, 254 F. 2d 221, should not control this case, because it was the intention of Congress to leave under the National Act the area of employer-employe relationships subject to state control, and, as evidenced by the instant case, there is even greater need for the states to control areas beyond employer-employe relationship.

The Federal Act is not in all instances exclusive, and does leave areas wherein the state has, in addition to the federal remedy, additional remedies in its courts.

ARGUMENT

I

UNDER OUR FEDERAL SYSTEM, CONGRESS IS NOT EMPOWERED TO PRE-EMPT THE ADMINISTRATIVE AND JUDICIAL SYSTEM DESIGNED BY STATES TO PROTECT THE ESSENTIAL FUNCTIONS OF THE GOVERNMENT OF THE STATE OR AN AGENCY THEREOF.

The concurring opinion in Supreme Court of the State of Wisconsin below was based upon this principle:

> "State of South Carolina v. United States, 1905, 199 U.S. 437, 451-452, 26 S. Ct. 110, 112, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:
>
> 'Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from the 2d clause of article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it.'
>
> "The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress

may preempt the field of labor relations as they may affect interstate commerce, the courts of the state under the principle of State of South Carolina v. United States, supra, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith."

The Statutes of the State of Wisconsin have set up definite rules, which must be followed in letting contracts for municipal construction in excess of $1,000. Sec. 59.01 gives to a municipal corporation the power to enter into contracts for necessary and proper work. Sec. 59.08 provides that all work done in the construction of a building which shall exceed $1,000 by a municipality shall be let by contract to the lowest responsible bidder. Sec. 66.29 (6) provides that a municipality must separately let (a) Plumbing; (b) Ventilating; and (c) Electrical Contracts.

Since the building was in the process of construction and the bids had been let, Door County was placed in a completely untenable position at the time the picket was placed on the job. The plumbing contract could not be consolidated with the general contract, because of the provisions of Sec. 66.29 (6) of the Statutes, which provide that the municipality must let them separately. The bids had been accepted, and Door County had a contract obligation with the bidders. Door County could not buy off the plumbing contract, because that would be an illegal expenditure of public funds. Menasha Wooden Ware Co. and others, v. Town of Winter and others, 159 Wis. 437.

The conduct engaged in by the Union in this case is also criminal under the state law. Wisconsin Statutes, Sec. 134.01.

The significance of the application of the principles of our federal system to this question is best emphasized by the argument in petitioner's brief at pp. 21-22. Petitioner contends that under the Garner v. Teamsters decision, 346 U.S. 485, as well as the other "pre-emption" decisions, the Congressional enactment is exclusive even though the federal act might be construed to exclude States from the term "person" and which would leave a State or an agency thereof with no remedy whatever to protect its essential governmental functions.

While this argument bears little investigation it does suggest another potential, and even probable, consequence flowing from the "pre-emption" decisions if applied to State governments, to-wit: The effective carrying on of essential functions of government would rest with the jurisdictional standards adopted by the National Labor Relations Board. In other words, if the jurisdictional standards of the Board were not met, the essential functions of State government, since its relation to interstate commerce is primarily in its construction of buildings, would find itself in the "no man's land" of federal-state labor regulations.

Certainly our federal systems did not intend that Congress frustrate the essential administration of local government (i. e.

construction of jails, police stations, schools and courthouses) by indirect action when it could not do so.

II

THE TAFT-HARTLEY ACT DID NOT ATTEMPT TO REGULATE THE ESSENTIAL FUNCTIONS OF STATE GOVERNMENTS, OR AGENCIES THEREOF, THROUGH ITS PRE-EMPTIVE POLICIES.

In Local No. 25, Teamsters etc. v. N.Y., N.H. & H.R. Co., 350 U.S. 155, this court held that while railroads were excluded from the definition of "employer" in section 2 (2) of the Taft-Hartley Act, the statute did not expressly exclude railroads from the definition of the term "person" and that therefore they are entitled to Board protection from the kind of unfair labor practice prescribed by section 8 (b) (4) (A). (Incidentally, we fail to see what labor "organizing" or "collective bargaining" purpose was being espoused by the picketing in that case. The mere fact that a union was protesting "piggy-back" competition to truckers did not warrant invoking that Taft-Hartley Act and the chain reaction which that decision developed into, as hereafter explained.) Following this ruling, the board reversed its prior "correlative right-duty" approach and held that it had jurisdiction upon a charge brought under section 8 (b) (4) (A) by a county government. This was affirmed in N.L.R.B. v. Local 313, Electrical Workers, 254 F. 2d 221 (C.C.A.

3rd, 1958) in which the court held:

> "This point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.
>
> The order of the Board will be enforced."

The Supreme Court of the State of Wisconsin, in the instant case, disagreed with the Local 313 decision upon the grounds that the rules of statutory construction used in the Local 25 case, involving railroads is not the statutory construction rule used when a statute of general application is sought to be applied to a government, federal or state, or agencies thereof, citing among other authorities the following:

Palmer v. Commonwealth of Mass.,
308 U.S. 79
Federal Trade Commission v. Bunte,
312 U.S. 349
82 C.J.S. Statutes § 317, p. 554
50 Am.Jur., Statutes § 222, p. 199

Presumably it was congressional intention, in excluding political subdivisions of the state from the definition of "employer" and in refusing to mend the Wagner Act in 1938, to exclude political subdivisions from the definition of "person" (S. 3390, 82 Cong. Rec. 1488-1489). This effectuates the principle of

Constitutional Law that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the essential governmental powers of the other. Educational Films vs. Ward et. al., 282 U.S. 379; Metcalf vs. Mitchell, 269 U.S. 514; South Carolina v. United States, 199 U.S. 437.

The definition of "employer" in section 2 (2) of the Act unmistakably gives rise to Congressional intention to permit the states to deal freely with their own employes and thus be enabled to discharge their functions of government without being fettered and restricted by the exercise of federal power, and this reasoning applies equally to areas of primary employer-employe relationship with the state or its subdivisions and employes and in other areas of labor dispute which directly affect the essential governmental function of the subdivision of the state. Indeed there is greater need for the state, if it is to effectuate its government, to control areas of labor dispute beyond the primary employer-employe relationship.

The courts, in preserving the balance between national and state power, should accord to the various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or technical distinction or deal in legal refinements, even though as a result seemingly inconsequential differences may require diverse results. Pacific Coast Dairy v. Dept. of Agriculture, 318 U.S. 285; Rehearing denied, 318 U.S. 801.

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Congress should never be held to intend to supersede or by its legislation suspend the exercise of police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. Schwartz v. Texas, 344 U.S. 199. See also California v. Zook, 336 U.S. 725.

As recently stated in Association of Machinists v. Gonzales, 356 U.S. 617:

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III

THE AREA OF ESSENTIAL GOVERNMENTAL FUNCTIONS OF A STATE, OR AGENCIES THEREOF, AT MOST, IS SUBJECT TO THE CONCURRENT JURISDICTION OF THE BOARD AND STATE AGENCIES AND COURTS.

In reviewing the legislative history of the National Act, the dissent in UAW v. Russell stated:

"It is clear from the legislative history of the Taft-Hartley Act that in subjecting certain conduct to regulation as an unfair labor practice Congress had no intention of impairing a State's traditional powers to punish or in some instances prevent that same conduct when it was offensive to what a leading case termed ' such traditionally local matters as public safety and order and the use of streets and highways.' Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740, 749, 10 LRRM 520. Both proponents and critics of the measure conceded that certain unfair labor practices would include acts 'constituting violation of the

law of the State,' 'illegal under State Law,' punishable under State and local police law', or acts of such nature that ' the main remedy for such conditions is prosecution under State law and better local law enforcement.' It was this role of state law that the lawmakers referred to when they conceded that there would be 'two remedies' for a violent unfair labor practice. For example, when Senator Taft was explaining to the Senate the import of the Sec. 8 (b) (1) (A) unfair labor practice, he responded in this manner to a suggestion that it would 'result in a duplication of some of the State laws':

> 'I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated State law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that State law. Secondary boycotts, jurisdictional strikes, and so forth, may involve some violation of State law respecting violence which may be criminal, and so to some extent the measure may be duplicating the remedy existing under State law. But that in my opinion is no valid argument.'

"This frequent reference to a State's continuing power to prescribe criminal punishments for conduct defined as an unfair labor practice by the Federal Act is in sharp contrast to the absence of any

reference to a State's power to award damages for that conduct." UAW v. Russell, 356 U.S. 634 reh. den. 357 U.S. 944

The fact that the Federal Act is not completely exclusive means that the state has, in addition to the federal remedy, a supplementary remedy which is local speedy, and effective.

Concurrent jurisdiction has in fact been exercised by many states under various pseudonyms and equivocations. The following cases apply, without stating the principle of concurring jurisdiction:

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We offer the following brief comments upon petitioner's attempt to take issue with the reasoning used in the concurring opinion below (Petitioner's Brief pp. 18-20):

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Next, petitioner argues that the concurring opinion below assumes that right, and not remedies, determine pre-emption. Where essential government functions are involved there is no pre-emption and no conflict between rights or remedies. See U.A.W. vs. Russell, cited above.

Petitioner argues that this case is governed by N.E.R.B. v. Milwaukee G & L. Co., 258 Wis. 1, reversed sub. nom. 340 U.S. 383. That was a public utility case and did not involve a governmental function.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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RESPONDENT'S APPENDIX

APPENDIX A

Wisconsin Statutes provide as follows:

"59.01 Municipal corporation. (1) STATUS. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09 (7) (d), to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it."

"59.08 Public work, how done; public emergencies. (1) All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

66.29 (6) SEPARATION OF CONTRACTS. On those public contracts calling for the construction, repair, remodeling or improvement of any public building or structure, other than highway structures and facilities, the municipality shall separately let (a) plumbing, (b), heating and ventilating, and (c) electrical contracts where such labor and materials are called for. The municipality shall have the power to set out in any public contract reasonable and lawful conditions as to the hours of labor, wages, residence, character and classification of workmen to be employed by any contractor, and to classify such contractors as to their financial responsibility, competency and ability to perform work and to set up a classified list of contractors pursuant thereto; and such municipality shall further have the power to reject the bid of any person, if such person has not been classified pursuant to the said questionnaire for the kind or amount of work in said bid. Whenever such municipality shall contemplate the letting of any public contract, pursuant to this section, the advertisement for proposals for the doing of the same shall expressly state in effect that the letting is made subject to this section and that such municipality reserves and has the right to reject any and all bids at any time."

"134.01 Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously

compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. of L. and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,

Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

The memorandum opinion of the Circuit Court for Door County (R. 1) is unreported. The opinion of the Wisconsin Supreme Court (R. 24) is reported in 4 Wis. 2d 142, 89 N.W. 2d 920.

STATUTES CITED

The federal statutory provisions are primarily sections 2(1)(2), 8(b)(4)(A) and (b) of the National Labor Relations Act.

The Wisconsin statutes involved are sections 59.01, 59.08(1), 66.29(6) and 134.01. These statutes are printed in Appendix A of this brief.

STATEMENT

Respondent agrees with the statement of the petitioners and amicus curiae, but presents the following additional facts:

Door County, through the Property and Building Committee of the Door County Board, let the contracts for the construction of the courthouse addition to the low bidders (R. 11). The Property and Building Committee was authorized to take charge of construction by the County Board (R. 14).

The business agent of Plumbers' Local 298 was given authority, by action on a motion at a regular union meeting, to place a picket on any job where there is a non-union plumber working on the job (R. 19). It was known to the union agent that when a picket was put on a job, the job stops (R. 19).

The trial court found that the picketing was coercive and amounted to economic pressure and was designated to cause a work stoppage (R. 12).

There was no controversy between the general contractor and his employees (R. 16) and no controversy between Zahn, the plumbing contractor, and his employees (R. 18), and the court so found (R. 1).

QUESTIONS PRESENTED

In addition to the question presented in the brief of the petitioners and the question presented in the brief of the National Labor Relations Board, Amicus Curiae, the following questions are raised by this appeal:

1. Does our federal scheme authorize Congress to pre-empt the field of law designed by a State to protect the essential functions of government of the State or an agency thereof?
2. Has Congress attempted to pre-empt labor disputes which interfere with the execution of essential governmental functions of a State or an agency thereof?
3. Is the area of essential governmental functions of a State, or Agencies thereof, at most, subject to concurrent jurisdiction of the Board and State agencies and courts?

SUMMARY OF ARGUMENT

The statutes of the State of Wisconsin regulate the procedure for letting contracts for municipal construction and apply to the courthouse construction which was picketed. The courthouse was essential to the governmental functions of the State of Wisconsin, and therefore regulation of picketing of such courthouse construction cannot be controlled by the jurisdictional standards set up by the National Labor Relations Board.

The NLRB vs. Local 313 Electrical Workers case, 254 F. 2d 221, should not control this case, because it was the intention of Congress to leave under the National Act the area of employer-employe relationships subject to state control, and, as evidenced by the instant case, there

is even greater need for the states to control areas beyond employer-employe relationship.

The Federal Act is not in all instances exclusive, and does leave areas wherein the state has, in addition to the federal remedy, additional remedies in its courts.

ARGUMENT

I

Under Our Federal System, Congress Is Not Empowered to Pre-Empt the Administrative and Judicial System Designed By States to Protect the Essential Functions of the Government of the State or an Agency Thereof.

The concurring opinion in Supreme Court of the State of Wisconsin below was based upon this principle:

> "State of South Carolina v. United States, 1905, 199 U.S. 437, 451-452, 26 S. Ct. 110, 112, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:
>
> 'Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from the 2d clause of article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it.'
>
> "The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress may preempt the field of labor relations as they may affect interstate commerce, the courts of the state under the

principle of State of South Carolina v. United States, supra, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith."

The Statutes of the State of Wisconsin have set up definite rules, which must be followed in letting contracts for municipal construction in excess of $1,000. Sec. 59.01 gives to a municipal corporation the power to enter into contracts for necessary and proper work. Sec. 59.08 provides that all work done in the construction of a building which shall exceed $1,000 by a municipality shall be let by contract to the lowest responsible bidder. Sec. 66.29 (6) provides that a municipality must separately let (a) Plumbing; (b) Ventilating; and (c) Electrical Contracts.

Since the building was in the process of construction and the bids had been let, Door County was placed in a completely untenable position at the time the picket was placed on the job. The plumbing contract could not be consolidated with the general contract, because of the provisions of Sec. 66.29(6) of the Statutes, which provide that the municipality must let them separately. The bids had been accepted, and Door County had a contract obligation with the bidders. Door County could not buy off the plumbing contract, because that would be an illegal expenditure of public funds. *Menasha Wooden Ware Co. and others, v. Town of Winter and others,* 159 Wis. 437.

The conduct engaged in by the Union in this case is also criminal under the state law. Wisconsin Statutes, Sec. 134.01.

The significance of the application of the principles of our federal system to this question is best emphasized by the argument in petitioner's brief at pp. 21-22. Petitioner

contends that under the *Garner v. Teamsters* decision 346 U.S. 485, as well as the other "pre-emption" decisions the Congressional enactment is exclusive even though th federal act might be construed to exclude States fro the term "person" and which would leave a State or a agency thereof with no remedy whatever to protect i essential governmental functions.

While this argument bears little investigation it doe suggest another potential, and even probable, consequenc flowing from the "pre-emption" decisions if applied t State governments, to-wit: The effective carrying on o essential functions of government would rest with th jurisdictional standards adopted by the National Labo Relations Board. In other words, if the jurisdictiona standards of the Board were not met, the essential func tions of State government, since its relation to interstat commerce is primarily in its construction of building would find itself in the "no man's land" of federal-stat labor regulations.

Certainly our federal systems did not intend tha Congress frustrate the essential administration of loca government (i.e. construction of jails, police station schools and courthouses) by indirect action when it coul not do so directly.

II

The Taft-Hartley Act Did Not Attempt to Regulat the Essential Functions of State Governments, or Agencies Thereof, Through Its Pre-Emptive Policies.

In *Local No. 25, Teamsters etc. v. N.Y. N.H. & H R. Co.*, 350 U.S. 155, this court held that while railroad were excluded from the definition of "employer" in sec

tion 2(2) of the Taft-Hartley Act, the statute did not expressly exclude railroads from the definition of the term "person" and that therefore they are entitled to Board protection from the kind of unfair labor practice prescribed by section 8(b)(4)(A). (Incidentally, we fail to see what labor "organizing" or "collective bargaining" purpose was being espoused by the picketing in that case. The mere fact that a *union* was protesting "piggy-back" competition to truckers did not warrant invoking that Taft-Hartley Act and the chain reaction which that decision developed into, as hereafter explained.) Following this ruling, the Board reversed its prior "correlative right-duty" approach and held that it had jurisdiction upon a charge brought under section 8(b)(4)(A) by a county government. This was affirmed in *N.L.R.B. v. Local 313, Electrical Workers,* 254 F. 2d 221 (C.C.A. 3rd, 1958) in which the court held:

> "This point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.
>
> "The order of the Board will be enforced."

The Supreme Court of the State of Wisconsin, in the instant case, disagreed with the *Local 313* decision upon the grounds that the rules of statutory construction used in the *Local 25* case, involving railroads is not the statutory construction rule used when a statute of general application is sought to be applied to a government, federal or state, or agencies thereof, citing among other authorities the following:

Palmer v. Commonwealth of Mass.,
308 U.S. 79

Federal Trade Commission v. Bunte,
312 U.S. 349

82 *C.J.S.* Statutes § 317, p. 554

50 *Am. Jur.*, Statutes § 222, p. 199

Presumably it was congressional intention, in excluding political subdivisions of the state from the definition of "employer" and in refusing to amend the Wagner Act in 1938, to exclude political subdivisions from the definition of "person" (S. 3390, 82 Cong. Rec. 1488-1489). This effectuates the principle of Constitutional Law that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the essential governmental powers of the other. *Educational Films vs. Ward et. al.*, 282 U.S. 379; *Metcalf vs. Mitchell*, 269 U.S. 514; *South Carolina v. United States*, 199 U.S. 437.

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Wisconsin Statutes provide as follows:

"59.01 Municipal corporation. (1) STATUS. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09(7)(d), to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it."

"59.08 Public work, how done; public emergencies. (1) All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committe is authorized by law to let or make."

"66.29(6) SEPARATION OF CONTRACTS. On those public contracts calling for the construction, repair, remodeling or improvement of any public building or structure, other than highway structures and facilities, the muni-

cipality shall separately let (a) plumbing, (b), heating and ventilating, and (c) electrical contracts where such labor and materials are called for. The municipality shall have the power to set out in any public contract reasonable and lawful conditions as to the hours of labor, wages, residence, character and classification of workmen to be employed by any contractor, and to classify such contractors as to their financial responsibility, competency and ability to perform work and to set up a classified list of contractors pursuant thereto; and such municipality shall further have the power to reject the bid of any person, if such person has not been classified pursuant to the said questionnaire for the kind or amount of work in said bid. Whenever such municipality shall contemplate the letting of any public contract, pursuant to this section, the advertisement for proposals for the doing of the same shall expressly state in effect that the letting is made subject to this section and that such municipality reserves and has the right to reject any and all bids at any time."

"134.01 Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or peform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500."

No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1952

PLUMBERS, STEAMFITTERS, REFRIGERATION PIPEFITTERS, AND APPRENTICES OF LOCAL NO. 298, A.F. OF L., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY, PETITIONERS

v.

COUNTY OF DOOR, A MUNICIPAL CORPORATION AND ARNOLD G. ZAHN AND THEODORE QUERENHOVEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A.F. OF L., AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY, PETITIONERS

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

OPINIONS BELOW

The findings of fact, conclusions of law, and memorandum opinion of the Circuit Court for Door County (R. 1–3, 6–9) are unreported. The opinion of the Wisconsin Supreme Court (R. 26–38) is reported at 89 N.W. 2d 920.

JURISDICTION

The petition for a writ of certiorari was granted on November 10, 1958. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*, are as follows:

Definitions

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Unfair Labor Practices

Sec. 8. (b) It shall be an unfair labor practice for an organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to

perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.

QUESTION PRESENTED

This brief discusses only a single question raised by petitioners, namely, whether a political subdivision, such as a county, is a "person" within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, as amended.

STATEMENT

The facts which give rise to the instant case, apparently undisputed, are as follows: On March 1, 1957, respondent County of Door, Wisconsin, a municipal corporation, entered into a general contract with respondent Oudenhoven for the construction of an addition to the County's court house at Sturgeon Bay, Wisconsin (R. 6–7, 17). Eight other contracts were also let by the County for various phases of the construction, including one for the plumbing work to respondent Zahn (R. 7, 18). The total cost of the court house addition was $450,000. Of this amount, approximately $225,000 represented the cost of materials manufactured outside the State of Wisconsin (R. 22).

All of the contractors on the job, except respondent Zahn, were unionized (R. 27). Petitioner Plumbers Union had sought to persuade Zahn to unionize his

operations and warned that otherwise there might be some difficulty on the construction project (R. 27). Zahn had refused to accede to this demand. Shortly after construction commenced on the court house addition, petitioners, from June 26 to July 5, 1957, and from July 15 to July 25, placed a picket on the sidewalk near the project. He carried a placard which stated in substance that non-union men were employed on the job. The placard also contained the designation "Plumbers Local 298, A.F. of L., CIO" (R. 7–8, 16, 19, 20). The picketing was conducted peacefully but, as anticipated by the Union, employees of the union contractors working on the project refused to cross the picket line (R. 7–8, 16, 19, 24).

The District Attorney of the County filed a joint complaint (on behalf of the County, Zahn and Oudenhoven) in the Circuit Court of Door County, alleging that the picketing violated Section 103.535 of the Wisconsin Statutes[1] and praying for an injunction (R. 3–4). Petitioners in their answer alleged, *inter alia*, that, under the National Labor Relations Act, as amended, exclusive jurisdiction over the controversy was vested in the National Labor Relations Board (R. 5–6).

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[1] Wis. Stats., Sec. 103.535 (1955) provides:

> It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives.

The trial court rejected this defense and found that the picketing not only was unlawful as alleged in the complaint but, in addition, violated Sec. 111.06 (2)(b) of the Wisconsin Statutes in that it sought to compel Zahn to interfere with his employees' rights of self-organization (R. 8). A temporary restraining order issued on July 27, 1957 (R. 9), and a permanent injunction on October 23, 1957, restraining petitioners from picketing the construction project (R. 10).

On appeal, the Supreme Court of Wisconsin, with one member dissenting, affirmed the trial court's judgment (R. 25). With respect to petitioners' contention that exclusive jurisdiction over the controversy was vested in the Labor Board, the court held that a political subdivision of a state is neither an "employer" nor a "person" within the purview of the federal Act and hence the National Labor Relations Board lacked jurisdiction over the controversy (R. 30–34). In reaching this result the court expressly noted its disagreement with the view of the Board and the United States Court of Appeals for the Third Circuit (*National Labor Relations Board* v. *Electrical Workers Local 313*, 254 F. 2d 221, enforcing 117 NLRB 437), that a county is a "person" within the meaning of Section 8(b)(4)(A) of the Act and entitled to its protection (R. 31–32).

SUMMARY OF ARGUMENT

Section 8(b)(4)(A) of the National Labor Relations Act, as amended, makes it unlawful for a union to induce the employees of any employer to engage in

work stoppages with an object of forcing or requiring "any employer or other person * * * to cease doing business with any other person." Section 2(2) of the Act which defines the term "person" to include various entities does not specifically enumerate governmental instrumentalities or entities as included within the definition. Although the Board at one time held that such instrumentalities were not persons within the meaning of the Act, this Court's decision in *Teamsters Union* v. *New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155, invalidated the basis of the Board's ruling. There, the Court held that a railroad, although not specifically enumerated in the statutory definition of the term "person", nevertheless was a person within the meaning and protection of Section 8(b)(4)(A). By a parity of reasoning, the Board has correctly concluded that a governmental instrumentality is likewise included within the term "person" in the statute.

The term "person", as used in a federal statute, ordinarily includes a State and its political subdivisions. This is certainly the case when the purpose, subject matter and scope of the enactment argue for full coverage.

The purpose and subject matter of Section 8(b)(4)(A) cogently suggest that a governmental instrumentality or entity, although not specifically enumerated in the statutory definition of the term "person", should not be excluded from the protection which the statute affords against the disruption of business relations through secondary strike pressures. The public interest in the unobstructed flow of com-

merce is harmed whether such secondary strike pressure hits a private person or a governmental agency. And it is unrealistic to suppose that Congress meant to deprive a governmental body of the protection which the statute broadly provides. Moreover, it is unreasonable to suppose that Congress meant to deny neutral secondary employers doing business with such governmental instrumentalities (such as the union contractors here) the protection and benefits of the Act merely because they happened to be doing business with a governmental body instead of a private person or corporation. To countenance such a result would bring about the very mischief Congress sought to prohibit.

ARGUMENT

A political subdivision, such as respondent county, is a "person" within the meaning of the National Labor Relations Act, as amended

The decision below rests principally upon the subsidiary conclusion that the term "person" in Section 8(b)(4)(A) of the National Labor Relations Act, as amended, does not include a political entity or subdivision, such as a county. This construction of the statute is contrary to the Board's position. Because of the importance of the issue in the administration of the Act, the Board deems it appropriate to submit its views to the Court.

As stated above, petitioner Union picketed the construction project because of the presence of Zahn's non-union employees. As the Union anticipated, this resulted in the refusal of the union employees of the other contractors to continue working. The picketing may thus be viewed as calculated to induce the em-

ployees of the union contractors to engage in a work stoppage, either (a) to force or require those contractors to cease doing business with the County so long as Zahn remained on the job, or (b) to force or require the County to terminate its contract with Zahn unless he acceded to the Union's demand to unionize his operations.

Section 8(b)(4)(A) makes it unlawful for a union to induce the employees "of any employer" to engage in a work stoppage with an object of forcing or requiring "any employer or other person * * * to cease doing business with any other person." Adapting this language to the situation here, it would appear that the Union induced the work stoppage either to force an employer, *i.e.*, the union contractors, to cease doing business with an "employer or other person," *i.e.*, the County, or to force an "employer or other person," *i.e.*, the County, to cease doing business with another person, *i.e.*, Zahn. The critical issue is, of course, whether a county is an "employer" *or* a "person" within the scope of the statutory language.

The Board, in its administration of the amended Act, has been confronted with the problem of applying the language of Section 8(b)(4)(A) to situations where political subdivisions or governmental instrumentalities are involved. The Board's present view is that such political subdivisions and other governmental instrumentalities, although they are not "employers" under the Act, are "persons" within its purview, and hence are entitled to its protection against secondary strike pressures designed to disrupt busi-

ness relations between them and other employers or persons.

The problem arises in either of two situations: (1) where a union seeks to induce the employees of a governmental instrumentality to engage in secondary work stoppages for the purpose of forcing that instrumentality to cease doing business with a disfavored private employer; or (2) where, as in the instant case, the union seeks to induce the employees of a secondary private employer in order to bring about a cessation of business between that employer and the governmental instrumentality (because the latter is doing business with a disfavored private employer), or to disrupt relations between the governmental instrumentality and some other private employer.

Section 2(2) of the Act, which defines the term "employer", specifically excludes "any State or political subdivision thereof." Because of this explicit language, the Board has uniformly held that political subdivisions or governmental instrumentalities are not "employers" within the meaning of Section 8(b)(4)(A). Accordingly, insofar as the prohibition of Section 8(b)(4)(A) is directed to inducement or encouragement of "employees of any employer" for the purpose of forcing "any employer" to cease doing business with any other person, the Board has uniformly held that political subdivisions or governmental instrumentalities are not employers within

the reach of that Section.[2] *Al J. Schneider*, 87 NLRB 99, 89 NLRB 221; *Sprys Electric Co.*, 104 NLRB 1128; *Paper Makers Importing Co., Inc.*, 116 NLRB 267.

A different issue is presented, however, where, as here, the union does not seek to induce the employees of a political subdivision to engage in secondary work stoppages but seeks, through inducement of employees of a secondary statutory employer, to bring about a cessation of business between the political subdivision and others. In that context, since the governmental entity is not, in the view of a majority of the Board, an "employer," the question presented is whether the political subdivision is a "person" within the meaning of Section 8(b)(4)(A). If it is, it is entitled to the protection of the statute against secondary strike pressures having as an object forcing or requiring "any employer *or other person* * * * to cease doing business *with any other person.*" (Emphasis supplied.) As the quoted language shows, the "object" language of Section 8(b)(4)(A), unlike the "means" language of the introductory paragraph of that Section, is not restricted to employers; it also includes "persons."

Section 2(1) of the Act which defines persons makes no reference to political entities, providing merely—

> The term "person" includes one or more individuals, labor organizations, partnerships, asso-

[2] The Board still adheres to this view. Board Member Rodgers, however, has taken the view that political subdivisions are "employers" as well as "persons" within the meaning of Section 8(b)(4)(A). *Paper Makers* case, *supra.*

ciations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

Despite the broad and inclusive language of this definition,[3] the Board was initially of the view that political subdivisions could not be considered as "persons" for the purpose of Section 8(b)(4)(A). The basic premises for the Board's position in this regard were (1) that the omission of any reference to political subdivisions in Section 2(1) of the Act reflected a congressional intent to exclude them from the term "person"; and (2) that Congress had legislated a scheme of correlative rights and duties attaching to employers, employees, and labor organizations from which political subdivisions were intentionally excluded as employers, and that this scheme would be shifted if a political subdivision could invoke the protection of Section 8(b)(4)(A) as a "person" while remaining immune (on the ground that it is not an "employer") from charges filed against it by others. The Board's early decisions also adverted to the fact that an effort to amend the Wagner Act in 1938 to include political subdivisions in the definition of "persons" was defeated in committee (S. 3390, 83 Cong. Rec. 1488–1489). See *Schneider* and *Sprys* cases, *supra*.

This was the state of Board decisions when this Court decided *Teamsters Union* v. *New York, New*

[3] "In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than one of limitation or enumeration. *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517.
Accord: *Federal Land Bank Co.* v. *Bismarck Co.*, 314 U.S. 95, 99–100; *Gray* v. *Powell*, 314 U.S. 402, 416; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 189.

Haven & Hartford Railroad Co., 350 U.S. 155. In that case, the railroad was in a position analogous to that of the County in the instant case. The union had induced employees of a transportation firm, which was a statutory employer, to cease delivering trailers to the railroad's flatcars with an object of forcing this firm to cease doing business with the railroad. When the railroad went into a state court to obtain injunctive relief against the union's conduct, the state tribunal granted the injunction[4] on the ground, *inter alia*, that the railroad would have no standing to invoke the Board's processes, citing, among other authorities, the Board's *Schneider* and *Sprys* decisions, *supra*. This Court, however, ruled that the Board and not the state court had jurisdiction over the controversy, stating (350 U.S. at 160):

> We think it clear that Congress, in excluding "any person subject to the Railway Labor Act" from the statutory definition of "employer," carved out of the Labor Management Relations Act the railroad's employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by doing so, Congress intended to divest the N.L.R.B. of jurisdiction over the controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, *since railroads are not excluded from the Act's definition of "person," they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8 (b) (4) (A).* [Emphasis supplied.]

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[4] *New York, New Haven & Hartford Railroad Co.* v. *Jenkins*, 331 Mass. 720, 122 N.E. 2d 759.

The *Teamsters Union* decision prompted the Board, in the *Peter D. Furness* case, 117 NLRB 437, to reconsider its interpretation of the statutory term "person" as applied to political subdivisions. There, as in the instant case, a county awarded a contract to a non-union contractor (Furness) to perform certain work at an installation owned and operated by the county. The union objected to Furness' doing the work, because he was non-union, and picketed the work site. As a result of the picketing, the union employees of other contractors on the job, Haddock and Bateson, quit working. The Board found, as alleged in the complaint, that the union had violated Section 8(b)(4)(A) of the Act by inducing the employees of Haddock and Bateson to engage in work stoppages with an object of forcing or requiring Haddock and Bateson to cease doing business with the county and forcing or requiring the county to cease doing business with Furness. The issue presented was whether the county was a "person" within the meaning of section 8(b)(4)(A).

As the Board reads it, this Court's decision in *Teamsters Union, supra,* invalidated the basic premises underlying the Board's prior holding that political subdivisions were not "persons" within the meaning of the Act. Thus, the Court's determination that "railroads are not excluded from the Act's definition of 'person'", albeit there is no reference to railroads in Section 2(1), weakened one prop of the *Schneider* and *Sprys* cases. Moreover, the decision of this Court, in holding that railroads are "persons" who may file charges for redress under

Section 8(b)(4)(A), while at the same time noting that the Act does not contemplate regulation of a railroad's employer-employee relationships, rendered untenable, in the Board's view, the "correlative rights and duties" construction which the agency had adopted in *Schneider* and *Sprys*. Finally, in its reconsideration of the problem, the Board concluded that the defeat in committee of the 1938 proposal to amend the Wagner Act by including political subdivisions in the definition of the term "person" was not of sufficient weight to override the conclusion that political subdivisions are entitled, as "persons", to the protection of Section 8(b)(4)(A). In sum, then, as the Board stated, 117 NLRB at p. 441, "Our reading of the Supreme Court's [*Teamsters Union*] decision convinces us that the *Schneider* and *Sprys* cases, insofar as they hold that political subdivisions are not 'persons' under Section 8(b)(4)(A) of the Act, should no longer be controlling and to that extent must be overruled."[8] Accord: *National Labor Relations Board* v. *Electrical Workers Local 313*, 254 F. 2d 221 (C.A. 3), enforcing the *Furness* case; see, also, *National Labor Relations Board* v. *Spring-*

[8] The Board has also applied the *Furness* rule to instrumentalities and agencies of the federal government. *Freeman Construction Co.*, 120 NLRB No. 106 (Department of the Army); *New Mexico Building Branch, Associated General Contractors*, 120 NLRB No. 58 (Atomic Energy Commission and U.S. Corps of Engineers).

field Building and Construction Trades Council (C.A. 1), decided December 31, 1958.[6]

The opinion below (R. 32-33) states that under established canons of statutory construction the term "person" is not to be read to include political or governmental entities in the absence of an express recital to that effect. We take issue with this on two grounds.

In the first place, we believe that there is a presumption, where a *federal* statute of general application is in question, that it embraces States, state agencies and state officers and employees. Thus it has been held that a State is a "person" within the meaning of the Sherman Act (*Georgia* v. *Evans*, 316 U.S. 159); that a State is a "person" within the meaning of a federal statute levying a tax upon persons en-

[6] It is of note that on the basis of this Court's decision in the *Teamsters Union* case the Board also concluded that railroads are "persons" within the meaning of Section 8(b)(4)(A). However, the Board, with Members Rodgers and Jenkins dissenting, has adhered to its ruling that railroads, like political subdivisions (see note *supra*, p. 10), are not employers within the meaning of Section 8(b)(4)(A). *International Rice Milling Co.*, 84 NLRB 360; *Superior Derrick Corp.*, 122 NLRB No. 6. Member Jenkins has taken the position that "the sole effect of Section 2 of the Act was to 'carve out' of the regulatory ambit of the Act the railroad company's *own* conduct of its relationships to its own employees *and no more*" (*U & Me Transfer*, 119 NLRB No. 114). For that reason he believes that railroads, and presumably political subdivisions, are employers within the protection of Section 8(b)(4)(A).

The Fifth Circuit has taken the position that railroads are employers within the meaning of Section 8(b)(4)(A). *International Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21, reversed on different ground, 341 U.S. 665; *W. T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129.

gaged in the sale of liquor (*Ohio* v. *Helvering*, 292 U.S. 360; *South Carolina* v. *United States*, 199 U.S. 437); and that a State is subject to a federal statute regulating common carriers by railroad (*United States* v. *California*, 297 U.S. 175). See, also, *New York* v. *United States*, 326 U.S. 572; *Wilmette Park District* v. *Campbell*, 338 U.S. 411; *Helvering* v. *Gerhardt*, 304 U.S. 405. Cf. *Metropolitan R'd* v. *District of Columbia*, 132 U.S. 1.

Secondly, we do not believe that the absence of an express recital in the federal statute would be conclusive even as to the application of that statute to the United States. It would still be open to the Court to determine the question in light of the purpose, subject matter and scope of the enactment. As this Court stated in *United States* v. *Cooper Corp.*, 312 U.S. 600, at 604–605:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring a state or nation within the scope of the law.

And see *Far East Conf.* v. *United States*, 342 U.S. 570, 576.[1]

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[1] It has sometimes been stated that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States* v. *United Mine Workers*, 330 U.S. 258, 272–273; see,

The purpose and subject matter of Section 8(b)(4)(A) cogently suggest that governmental and political entities are embraced. The Board's conclusion that a political subdivision, such as the County here, is a "person", entitled to protection against secondary pressures is consistent with, if not compelled by, the purpose underlying Section 8(b)(4)(A). The Congressional objective, as this Court has stated, was to shield "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. In Congress' view, such pressures, extending the area of industrial conflict to neutral employers and persons, were incompatible with the public interest in the free flow of commerce. *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 357 U.S. 93, 100; Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 8, reprinted in *Legislative History of the Labor Management Relations Act*, 1947 (U.S. Gov't Print. Off., 1948), p. 414.

Clearly, the public interest in the unobstructed flow of commerce is harmed whether secondary strike

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also, *Nardone* v. *United States*, 302 U.S. 379, 383. But, even as so stated, the rule is obviously inapplicable to Section 8(b)(4)(A) for that Section does not, of course, divest any governmental agency of any preexisting rights or privileges. Indeed, to construe the term person as excluding governmental agencies would deprive them of remedies which the statute affords to private employers and persons. In these circumstances "a general statute which is beneficial to the sovereign will be liberally interpreted to secure for it the same rights, privileges and protection granted to individuals." *Sutherland on Statutory Construction* (3d ed., Horack, Vol. 3, Sec. 6302).

activity hits a private party or a governmental agency. Indeed, the injury to the public is particularly apparent when such activities are directed against a governmental entity.

All of the considerations which moved Congress to protect private employers and persons from secondary labor boycotts apply to governmental agencies or instrumentalities. Unquestionably, such instrumentalities are likely to be injured by the prohibited practices. It is difficult to believe that Congress meant to deprive a governmental body, not itself involved in any labor dispute, of the protection which the statute generally affords to those adversely affected by secondary pressures. "Reason balks against implying denial of such a remedy * * *." *Georgia* v. *Evans*, 316 U.S. 159, 162. So incongruous a purpose should not be attributed to Congress unless there are "evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy" from governmental agencies. *United Mine Workers, supra,* 330 U.S. at p. 270. No such showing can be made. On the contrary, the underlying legislative purpose reflected in Section 8(b)(4)(A) removes any basis for excluding governmental agencies from the reach of the term "person." *National Labor Relations Board* v. *Electrical Workers Local 313*, 254 F. 2d 221 (C. A. 3).

Moreover, it is highly unreasonable to suppose that Congress meant to deny to neutral employers doing business with governmental bodies the protection and benefits which they would have in doing business with private persons or corporations. To countenance

such a result would invite the very mischief Congress sought to bar. As this Court has stated, Congress, in Section 8(b)(4)(A), "aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Carpenters Local 1976, supra,* 357 U.S. at p. 100. To deprive secondary employers of the protection which the statute thus gives them, merely because they are doing business with a governmental entity, would tend to defeat the basic statutory purpose. The anomalous result would be to permit labor organizations to engage in the practices denounced by Section 8(b)(4)(A) whenever the work is being performed under government contract.[8]

[8] The practical significance of such an exemption—which also serves to rebut it—is underscored by the fact that construction contracts (to say nothing of other public contracts) entered into by federal, state, and local governments during the first eight months of 1958 involved expenditures in excess of 9 billion dollars. U.S. Dept. of Labor and U.S. Dept. of Commerce, *Construction Review* (Dec. 1958) Vol. 4, p. 2.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the ruling below that the County is not a "person" within the meaning of the National Labor Relations Act, as amended, is erroneous.

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